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THE CONSTITUTION OF INDIA



THE  
CONSTITUTION OF INDIA  
ITS PHILOSOPHY AND BASIC POSTULATES

P. B. GAJENDRAGADKAR

47761

GANDHI MEMORIAL LECTURES  
UNIVERSITY COLLEGE, NAIROBI  
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## Foreword

These lectures by Dr. P. B. Gajendragadkar, Vice-Chancellor of the University of Bombay and former Chief Justice of India, inaugurate the Gandhi Memorial Lectures, which have been made possible by a generous annual grant to the College by the Gandhi Memorial Academy Society. We take this opportunity to acknowledge our indebtedness and our appreciation.

Universities throughout the world attain rank and eminence not only through the scholars they send forth into the world of action, but also through their success and ability to attract distinguished leaders and scholars to share their thoughts and ideas with the generation still serving their apprenticeship. This grant makes it possible for the College to invite a distinguished scholar every year to mount its rostrum and speak to its academic body of masters and students, to the community of Nairobi and now, through this publication, to the world.

Some may question the rationale of lectures in an African university being a memorial to the leader of another country. In part this documents the very close relationship which has existed, and continues to exist, between the Gandhi Memorial Academy Society of East Africa and the College. But more so, it is a memorial to a world leader, particularly in this centenary year of the birthday anniversary of the Mahatma.

Gandhi's fearlessness and outspokenness, even against his own environment, carry that quality and spirit which we would like to see as a feature of any platform within our institution. We are therefore proud to honour in this series the memory of a great humanitarian and intellectual, an ecumenical apostolic figure who would have behaved in Kenya, and did behave in South Africa, as he did in his own country, India.

The lectures will be delivered annually by outstanding scholars

from various parts of the world on a subject of their choice, with the only restriction that any theme chosen should not in any way be against the ideals for which Mahatma Gandhi stood. We are deeply gratified that the distinguished scholar to inaugurate the series has come from the Mahatma's own country.

University College, Nairobi, will become a great institution only if its staff and students think and act creatively in their work. Thus, we are most grateful to Dr. Gajendragadkar and to the distinguished line of scholars that will follow for the contribution they will be making in helping us appreciate more completely the nature and the role of our mission as a seat of learning in our contemporary society.

*University College, Nairobi.  
16 October 1968.*

Arthur T. Porter

# Contents

	<i>Page</i>
<i>Foreword</i>	v
<i>Introduction</i>	ix
<i>Tribute to Mahatma Gandhi</i>	xi
1. The Making of the Constitution	1
2. What is a Constitution?	9
3. The Preamble and the Directive Principles of State Policy	12
4. Fundamental Rights	23
5. Remedy for Enforcement of Fundamental Rights	56
6. The Unity of India—Basic Concept of the Constitution	63
7. How does the Constitution deal with Possible Emergencies?	68
8. The Power to amend the Constitution	74
9. Kenya and India—Common Philosophy of National Life	89



## Introduction

I feel honoured by the invitation which the University College, Nairobi, has extended to me to deliver and inaugurate the first series of lectures organized by the University College in memory of Mahatma Gandhi. As part of the association which the University College has had with the Gandhi Memorial Academy Board, the University College has decided to organize an annual series of lectures to be known as the Gandhi Memorial Lectures.

The University College thought that since the lectures were organized to honour the memory of Mahatma Gandhi, a world statesman and humanitarian, it would be appropriate for the first of these lectures to be delivered by a scholar from India, which is the birthplace of Gandhiji. I realize that I do not adequately deserve the epithet of scholar; nevertheless, when Principal Porter offered the invitation to me, I could not resist it, notwithstanding the fact that I was fully conscious of my inadequacy to discharge this responsible function. I thought that as a Vice-Chancellor intimately connected with university education, it would be my duty and my privilege to respond to the invitation and pay homage to the memory of Gandhiji on this auspicious occasion. I must, therefore, begin by expressing my gratitude to the University College authorities for having invited me to deliver the inaugural lectures in the series.

When Principal Porter invited me to deliver this year's lectures, he indicated that originally he and his colleagues had thought of restricting the lectures to themes related to the ideals for which Mahatma Gandhi stood. After some consideration, however, they found it necessary to leave the scope and the theme open to the scholar to choose from his field of specialization. There is only one restriction that has been imposed, and rightly too; and that is,

that the theme chosen by the speaker should not in any way be against the ideals for which Mahatma Gandhi stood.

I have accordingly decided that it would not be inappropriate if, on the occasion of the inaugural lectures in the series, I speak on 'The Constitution of India—Its Philosophy and Basic Postulates'. Before I proceed to deal with my subject, I would like to quote Gandhiji on what he thought to be the ideal constitution for a free India. Said Gandhiji:

I shall strive for a constitution which will release India from all thraldom and patronage and give her, if need be, the right to sin. I shall work for an India in which the poorest shall feel that it is their country in whose making they have an effective voice; an India in which there shall be no high class and low class of people; an India in which all communities shall live in perfect harmony. There can be no room in such an India for the curse of untouchability or the curse of intoxicating drinks and drugs. Women will enjoy the same rights as men. Since we shall be at peace with all the rest of the world, neither exploiting, nor being exploited, we should have the smallest army imaginable. All interests not in conflict with the interests of the dumb millions will be scrupulously respected, whether foreign or indigenous. Personally I hate distinction between foreign and indigenous. This is the India of my dreams. . . . I shall be satisfied with nothing else.<sup>1</sup>

In dealing with the philosophy and the basic postulates of the Indian Constitution, I will endeavour to examine whether Gandhiji's dream has, in fact, been realized or not.

<sup>1</sup> M. Chalapathi Rau, *Gandhi and Nehru* (Allied Publishers, New Delhi 1967), p. 2.

## Tribute to Mahatma Gandhi

It is said that the Greek philosopher Diogenes once walked through the streets of Athens in broad daylight with a lantern in his hand. As he walked along, he closely scrutinized the face of every passer-by in the light of his lantern. Diogenes was known for his eccentricities. Even so, when people saw him walking through the streets with a lantern in his hand in broad daylight, they were surprised at his conduct. One inquisitive fellow-Athenian accosted him and inquired what he was about. Diogenes replied that, in the light of his lantern, he was trying to identify if any cultured and civilized human was walking on the roads of Athens, and he added that so far his attempt to identify a cultured and civilized human had failed.

If Diogenes had met Gandhiji, he would have realized immediately that he was in the presence of a cultured and civilized human. It may be said truly and with full justification that in Gandhiji, the world witnessed the presence of a universal man. His life was a hymn of effort. Like Socrates, who said that he was not an Athenian, nor a Greek, but a citizen of the world, Gandhiji's life shows that he was a citizen of the world. His country was the world and to do good was his religion. 'For me,' said Gandhiji, 'patriotism is the same as humanity. I am patriotic because I am human and humane. It is not exclusive. . . . I believe in the essential unity of man and, for that matter, of all that lives.'

Born on the 2nd of October 1869, Gandhiji met a martyr's death and passed away from this world on the 30th of January 1948. When the assassin's bullets shot into his body, Gandhiji faced death cheerfully and calmly, in the sublime style of a true *satyagrahi*, with the words 'Hare Ram' (Oh God!) on his lips.

<sup>1</sup> M. Chalapathi Rau, op. cit., pp. 5-6.

By his death Gandhiji joined the celestial circle in which Jesus Christ and Buddha shine.

Small in physical stature, frail in appearance, eyes both piercing and kindly, heart full of compassion and love for the whole human race, style of speech lucid and clear, writings simple like the Bible, will invincible, determination to fight evil rock-like—Gandhiji was a giant among men. His approach to life and all its problems was human, though his faith in the basic concepts of his philosophy was superhuman. His moral and ethical stature was unparalleled and the spirit of dedication to serve the downtrodden which inspired him, made his life a real saga in history. Not a scholar, nor a philosopher in the traditional sense, Gandhiji was a seer, a sage who belonged to the class of the saviours of mankind.

'Then Gandhi came', said Jawaharlal Nehru. 'He was like a powerful current of fresh air that made us stretch ourselves and take deep breaths, like a beam of light that pierced the darkness and removed the scales from our eyes, like a whirlwind that upset many things but most of all the working of people's minds. He did not descend from the top; he seemed to emerge from the millions of India, speaking their language and incessantly drawing attention to them and their appalling condition. Get off the backs of these peasants and workers, he told us, all you who live by their exploitation: get rid of the system that produces this poverty and misery.'<sup>1</sup>

What are the basic principles of Gandhiji's philosophy? The first principle is that all humans must consistently search for truth. Truth in Gandhiji's concept was synonymous with God and had two aspects: *Saty* and *Rita*, material truth and ethical truth. Gandhiji emphasized that truth has many facets and so the *Sadhaka* (student) embarking on the pilgrimage of search for truth must be humble in spirit and tolerant in approach. 'I do not like the word tolerance,' said Gandhiji once, 'but could not think of a better one. Tolerance may imply a gratuitous assumption of the inferiority of other faiths to one's own, whereas *Ahimsa* teaches us to entertain the same respect for the religious faiths of others as we accord to our own, thus admitting the imperfection of the latter.'

'Even as a tree has a single trunk, but many branches and leaves, so there is one true and perfect Religion, but it becomes many, as

<sup>1</sup> Jawaharlal Nehru, *The Discovery of India* (Signet Press, Calcutta, 1946), p. 427.

it passes through the human medium. I recognize no God except the God that is to be found in the hearts of the dumb millions. They do not recognize his presence; I do. And I worship the God that is Truth, or Truth which is God, through the service of these millions.' (*Hariljan*, 11 March 1939).<sup>1</sup>

*Ahimsa* or non-violence was another basic tenet of Gandhiji's philosophy. This concept is not passive or negative; it is positive and dynamic. It is the non-violence of the strong, not of the weak. It is inexorably committed to fight *for* truth and *against* untruth. If a person is strong enough to fight untruth by non-violence, he ought to attempt that task; but if he is not able to fight untruth by non-violence, recourse to violence is not only not prohibited, but becomes his obligation. 'I do believe,' said Gandhiji, 'that where there is only a choice between cowardice and violence, I would advise violence. I would rather have India resort to arms in order to defend her honour than that she should, in a cowardly manner, become or remain a helpless witness to her dishonour.'

The other principle which Gandhiji incessantly preached and consistently practised was the need to serve the downtrodden of this earth. Gandhiji was the champion of the *Daridra-Narayan*, the downtrodden poor man of this world. The crusade which he started for fighting untouchability illustrates how passionately Gandhiji desired to uplift the downtrodden. An individual life not dedicated to the righteous cause of helping the poor is, in Gandhiji's concept, lived in vain. Gandhiji emphasized the significance of faith in the life of an individual as well as of the community. He recognized that reason must guide human thought and action, but insisted upon a synthesis between reason and faith. 'Works without faith and prayer,' said he, 'are like artificial flowers that have no fragrance. I plead not for the suppression of reason, but for a due recognition of that in us which sanctifies reason itself.'

Gandhiji will always be remembered by the world as the author of the doctrine of *Satyagraha*, i.e. non-violent resistance in vindication of truth. In 1910, William James wrote of the Moral Equivalent of war. 'So far,' he said, 'war has been the only force that can discipline a whole community, and until an equivalent dis-

<sup>1</sup> S. Radhakrishnan (ed.), *Mahatma Gandhi* (George Allen & Unwin Ltd. London 1939), p. 31.

<sup>2</sup> *Mahatma Gandhi, To The Students* (Anand T. Hingorani, Karachi 1941), p. 149.

cipline is organized, I believe that war must have its way.' *Satyagraha* provided the equivalent for which William James was looking and there is literally no limit to its possibilities. If war debases, *Satyagraha* ennobles while achieving the same end. As C. E. M. Joad has observed:

Gandhi is a moral genius and his method belongs to the coming generation. He has announced a method for the settlement of disputes which may not only supersede the method of force, but as man grows powerful in the art of destruction, must supersede it, if civilization is to survive.<sup>1</sup>

Romain Rolland felt no doubt that Gandhiji's '*Satyagraha* experiment is the sole chance now existing in the world of effecting transformation of humanity without violence. If this fails there will remain no other issue in human history but violence'.<sup>2</sup>

Every thoughtful citizen of the world has been prayerfully hoping that the world of tomorrow would be a society based on non-violence. This may seem to be a distant goal, unrealistic and utopian. But history shows that the utopia of today becomes the commonplace of tomorrow. The goal set by Gandhiji is really not unattainable. If all progressive citizens of the world begin to work for it here and now, the goal may in due course be reached by the human race.

There is one significant feature of Gandhiji's approach to the problems of life to which it is necessary to refer. Gandhiji did not believe in any dogma or 'ism' as such, and was always prepared, as a supreme seeker of truth, to change his views and his policies if he was satisfied that they were erroneous, either partly or wholly, and needed to be revised. When one correspondent drew Gandhiji's attention to the apparent inconsistency between the views expressed by him on one matter, Gandhiji's reply was typical. 'I would like to say to this diligent reader of my writings,' he said, 'and to others who are interested in them that I am not at all concerned with appearing to be consistent. In my search after Truth I have discarded many ideas and learnt many new things. Old as I am in age, I have no feeling that I have ceased to grow inwardly or that my growth will stop at the dissolution of the flesh. What I am concerned with is my readiness to obey

<sup>1</sup> M. Chalapathi Rau, op. cit., p. 23.

<sup>2</sup> *ibid.*

the call of Truth, my God, from moment to moment, and, therefore, when anybody finds any inconsistence between any two writings of mine, if he still has faith in my sanity, he would do well to choose the latter of the two on the same subject.' (*Harijan*, 29 April 1933).<sup>1</sup>

When one considers the broad facets of Gandhiji's life and philosophy, one recognizes the fact that he was the prophet of a liberated life, who wielded power over millions of human beings, not by political authority or by military prowess, but by virtue of his exceptional holiness and moral heroism. As Dr. S. Radhakrishnan has observed:

There will always be some who will find in such rare examples of sanctity the note of strength and stark reality which is missing in a life of general goodwill, conventional morality or vague aesthetic affectation which is all that many modern teachers have to offer. To be true, to be simple, to be pure and gentle of heart, to remain cheerful and contented in sorrow and danger, to love life and not to fear death, to serve the Spirit and not to be haunted by the spirits of the dead, nothing better has ever been taught or lived since the world first began.<sup>2</sup>

India, like Kenya, is committed to secularism. India, like Kenya, passionately believes that secularism is the very foundation of the democratic way of life. How secular Gandhiji was can best be illustrated by the exalted sentiments which he expressed on the problem of the protection of cows, which occasionally assumes high political overtones in the current politics of India. Said Gandhiji:

The Hindu religion prohibits cow slaughter for the Hindus, not for the world. The religious prohibition comes from within. Any imposition from without means compulsion. Such compulsion is repugnant to religion. India is the land not only of the Hindus, but also of the Muslims, the Sikhs, the Parsis, the Christians and the Jews and all who claim to be Indian and are loyal to the Indian Union. If they can prohibit cow slaughter in India on the religious grounds, why cannot the Pakistan Government prohibit, say, idol worship in Pakistan on similar grounds?!

<sup>1</sup> Clifford Manshardt, *Pioneering on Social Frontiers in India* (Lalvani Publishing House, Bombay 1967), p. 103.

<sup>2</sup> S. Radhakrishnan, op. cit., p. 40.

am not a temple goer, but if I were prohibited from going to a temple in Pakistan, I would make it a point to go there even at the risk of losing my head. Just as Shariat cannot be imposed on the non-Muslims, the Hindu law cannot be imposed on the non-Hindus.<sup>1</sup>

Gandhiji's life truly represents the high watermark of human excellence and can be justly compared to the lives of Christ and Buddha. Said Jawaharlal Nehru:

The light has gone out, I said, and yet I was wrong. For the light that shone in this country was no ordinary light. The light that has illumined this country for these many many years will illumine this country for many more years, and a thousand years later that light will still be seen in this country and the world will see it and it will give solace to innumerable hearts. For that light represented something more than the immediate present, it represented the living, the eternal truths, reminding us of the right path, drawing us from error, taking this ancient country to freedom.<sup>2</sup>

It is in honour of such a great Mahatma, the high-souled Gandhi, that this University College has wisely decided to organize the Gandhi Memorial Lectures.

<sup>1</sup> A. B. Shah (ed.), *Cow Slaughter* (Lalvani Publishing House, Bombay 1967), p. 14.

<sup>2</sup> C. D. Narasimhalah (ed.), *India's Spokesman* (Macmillan and Co. Ltd. Madras, 1960), p. 285.

# I

## The Making of the Constitution

### THE STORY ABOUT THE WORK OF THE CONSTITUENT ASSEMBLY

Before I proceed to deal with the main subject of my discussion, I think it would be relevant if I indicate broadly how the Indian Constitution came to be drafted and adopted by the Constituent Assembly.

The Constitution consists of 22 parts and 9 schedules, and the number of its articles is 395. 15 of these articles came into force on the 26th of November 1949, when the third reading of the Constitution was finished, signed by the President of the Assembly and declared as passed. The remaining provisions of the Constitution came into force on the 26th of January 1950. This day is referred to in the Constitution as 'the commencement of the Constitution'.

The career of the Constituent Assembly began in somewhat embarrassing circumstances. The Cabinet Mission sent by the British Government found that its attempt to evolve a constitution agreeable to all the sections of the Indian public had failed; and that led to the framing of a scheme by the Mission which was in the nature of a recommendatory scheme. The Mission had contemplated that the scheme would ultimately receive the agreement of the two major political parties: the Indian National Congress and the Muslim League. In pursuance of the scheme, elections to the Constituent Assembly were held. The Muslim League took part in this election and many of its candidates were returned. The Congress won an overwhelmingly large number of seats. How-

ever, before the proceedings of the Constituent Assembly could commence effectively, a sharp difference of opinion arose between the Congress and the League regarding the interpretation of the grouping clauses contained in the proposals of the Cabinet Mission. I am not concerned to inquire into the nature of the scheme and what part the grouping clauses played in it. I am only narrating the history of how the Constituent Assembly came to be constituted and how it had ultimately to work only for India.

When the British Government saw that a sharp difference of opinion had arisen between the Congress and the League in regard to the interpretation of the grouping clauses, they intervened and explained to the leaders of both the parties that they had upheld the contention of the League and, accordingly, on the 6th of December 1946, they issued the following statement:

Should a constitution come to be framed by the Constituent Assembly in which a large section of the Indian population had not been represented, His Majesty's Government would not contemplate forcing such a constitution upon any unwilling part of the country.

This statement clearly recognized the possibility of two Constituent Assemblies and two States, and that eventually led to the division of India into India and Pakistan.

As a result of the policy which became apparent from the said statement, on the 9th of December 1946, when the Constituent Assembly first met, the League members did not attend and the Assembly began to function with the non-Muslim League members alone. At that stage, the League urged for the dissolution of the Constituent Assembly of India on the ground that it did not fully represent all sections of the people of India; on the other hand, the British Government, by their statement of the 20th of February 1947, declared:

(a) that British rule in India would in any case end by June 1948, after which the British would certainly transfer authority to Indian hands;

(b) that if a fully representative Constituent Assembly failed to work out a constitution in accordance with the proposals made by the Cabinet Delegation.

H.M.G. will have to consider to whom the powers of the Central Government in British India should be handed over, on the due

date, whether as a whole to some form of Central Government for British India, or in some areas to the existing Provincial Governments, or in such other way as seems most reasonable and in the best interests of the Indian people.

This was obviously a direct invitation to the Muslim League to dissociate itself from the labours of the Constituent Assembly. Later, the British Government sent Lord Mountbatten to India as her Governor-General in order to expedite the preparations for the transfer of power for which they had fixed a rigid time-table.

It is as a result of these developments that the Constituent Assembly, which had first sat on the 9th of December 1946, re-assembled after midnight on the 14th of August 1947 as the Sovereign Constituent Assembly for India. On the 15th of August, by an Act of Parliament, India was divided into India and Pakistan and the Constituent Assembly of India earnestly began its work of drafting a Constitution for India.

On the 13th of December 1946, the Objectives Resolution was moved in the Constituent Assembly and it was ultimately adopted on the 22nd of January 1947. It is pertinent for our purpose to read this Objectives Resolution. This is how the Resolution reads:

This Constituent Assembly declares its firm and solemn resolve to proclaim India an Independent Sovereign Republic and to draw up for her future governance a Constitution:

(2) Wherin the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India shall be a Union of them all; and

(3) Wherein the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and

(4) Wherein all power and authority of the Sovereign Inde-

pendent India, its constituent parts and organs of Government, are derived from the people; and

(5) Wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) Wherein shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilized nations; and

(8) This ancient land attain its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind.

On the 29th of August 1947, a Drafting Committee was appointed by the Constituent Assembly. This Committee embodied the decisions of the Assembly with alternative and additional proposals in the form of a 'Draft Constitution', which was published in February 1948. The Draft was presented to the Constituent Assembly on the 4th of November 1948, and after a brief general discussion, which can be regarded as the first reading of the Constitution, there was a second reading consisting of a consideration of the clauses of the Draft, which commenced on the 15th of November 1948, and terminated on the 17th of October 1949. The Constituent Assembly again sat on the 14th of November 1949 for the third reading, which was finished on the 26th of November 1949. As I have already mentioned, on this latter date the Constitution received the signature of the President of the Assembly and was declared as passed.

In retrospect, it may be worthwhile to recall that the national liberation movement which succeeded in removing foreign domination from the soil of India and declaring India a Sovereign Democratic Republic began on the 28th of December 1885. It is on this date that the Indian National Congress held its first session in Bombay. It is indeed a remarkable tribute to the liberalism of English thought that A. O. Hume, an Englishman, who had distinguished himself as a friend of the Indian people while serving in India as a member of the Indian Civil Service, continued to take

interest in Indian affairs even after his retirement and played a major role in the founding of the Indian National Congress. Before the Congress was actually founded, Hume addressed an open letter to the Graduates of Calcutta University, and it contained the following passage which speaks for itself:

If you, the picked men, the most highly educated of the nation, cannot, scorning personal ease and selfish objects, make a resolute struggle to secure greater freedom for yourselves and your country, a more impartial administration, a larger share in the management of your own affairs, then we, your friends, are wrong and our adversaries right; then are Lord Ripon's noble aspirations for your good fruitless and visionary; then, at present at any rate, all hopes of progress are at an end, and India truly neither lacks nor deserves any better Government than she enjoys. . . . *Let the yoke gall your shoulders never so sorely, until you realise and stand prepared to act upon the eternal truth that self-sacrifice and unselfishness are the only unfailing guides to freedom and happiness.*<sup>1</sup>

When the Indian National Congress began its career at its first session in Bombay, its direct objects were formulated in a very modest way. They were:

- (1) to enable all the most earnest labourers in the cause of National progress to become personally known to each other,
- (2) to discuss and decide upon the political operations to be undertaken during the ensuing year.<sup>2</sup>

In contrast to the liberal spirit of Hume, note the violent reaction of the *London Times* in relation to the activities of the Indian National Congress. 'The resolutions,' observed the *London Times*, 'passed by the Indian National Congress at its first session, cover a wide ground. Some of them we heartily approve. Others appear to us something more than questionable.' So far as this is concerned, no one can take any legitimate objection to it. But see what follows. 'It was by force,' said the paper, 'that India was won, and it is by force that India must be governed, in whatever hands the Government of the country may be vested. If we were to withdraw, it would be, not in favour of the most fluent tongue, or the most

<sup>1</sup>K. Iswara Dutt, *Congress Cyclopaedia* published by author, (New Delhi, Vol. 1), p. 7.

<sup>2</sup>*Ibid.*, p. 14.

ready pen, but the strongest arm and the sharpest sword." I need hardly add any comment on this statement.

On the other hand, Dr. Annie Besant expressed her response to the first Congress in these words:

The first National Congress dissolved, leaving a happy and inspiring memory of fine work done, and unity demonstrated. India had found her Voice. India was realising herself as a Nation. Strange and menacing was the portent in the eye of some. Splendid and full of hope in the eyes of others. The rosy fingers of the dawn-maidens had touched the Indian skies. When would her Sun of Freedom rise to irradiate the Motherland?\*

History shows that the Sun of Freedom rose in the Indian sky on the morning of the 15th of August 1947.

Before I part with this topic, it is necessary to refer to two statements which have a historical significance in relation to the subject matter of my lectures. On the night of the 14th of August 1947, while addressing the Constituent Assembly, Nehru expressed sentiments which have since occupied a place of pride in the hearts of all Indians. Said Nehru:

Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially. At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes but rarely in history, when we step out from the old to the new, when an age ends, and when the soul of a nation, long suppressed, finds utterance. It is fitting that at this solemn moment we take the pledge of dedication to the service of India and her people and to the still larger cause of humanity.

I beg to move, Sir.

That it be resolved that:

After the last stroke of midnight, all members of the Constituent Assembly present on this occasion, do take the following pledge: 'At this solemn moment when the people of India, through suffering and sacrifice, have secured freedom, I, ..... a member of the Constituent

\*ibid, p. 15.

\*ibid.

Assembly of India, do dedicate myself in all humility to the service of India and her people to the end that this ancient land attain her rightful place in the world and make her full and willing contribution to the promotion of world peace and the welfare of mankind."

At this stage it may also not be irrelevant to point out that when the Constitution was finally adopted on the 26th of November 1949, Dr. Ambedkar, who was its main architect, frankly expressed his grave apprehensions about the future of Indian democracy in poignant terms. He said:

... my mind is so full of the future of our country, that I feel I ought to take this occasion to give expression to some of my reflections thereon. On 26th January, 1950, India will be an independent country. What would happen to her independence? Will she maintain her independence or will she lose it again? This is the first thought that comes to my mind. . . . Will history (of division and treachery) repeat itself? It is this thought which fills me with anxiety. This anxiety is deepened by the realization of the fact that in addition to our old enemies in the form of castes and creeds we are going to have many political parties with diverse and opposing political creeds. If we wish to maintain democracy not merely in form, but also in fact, what must we do?

The first thing in my judgment we must do is to hold fast to constitutional methods of achieving our social and economic objectives. It means we must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and *satyagraha*. The second thing we must do is to observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy, namely, not "to lay their liberties at the feet of even a great man, or to trust him with powers which enable him to subvert their institutions".

There is nothing wrong in being grateful to great men who have rendered life-long services to the country. But there are limits to gratefulness. As has been well said by the Irish Patriot Daniel

<sup>1</sup> *Independence and After* (A collection of the more important speeches of Jawaharlal Nehru from September 1946 to May 1949). (The Publications Division, Government of India, New Delhi, 1949), pp. 3-4.

O'Connell, no man can be grateful at the cost of his honour, no woman can be grateful at the cost of her chastity and no nation can be grateful at the cost of its liberty. . . . The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life.

These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity.

Dr. Ambedkar concluded this historic speech with the following significant warning:

How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.<sup>1</sup>

That, in brief, is the story about the drafting of the Constitution by the Constituent Assembly of India. As Granville Austin has observed:

With the adoption of the Constitution by the members of the Constituent Assembly on 26 November 1949, India became the largest democracy in the world. By this act of strength and will, Assembly members began what was perhaps the greatest political venture since that originated in Philadelphia in 1787.<sup>2</sup>

<sup>1</sup> *Constituent Assembly Debates*, Vol. XI (Government of India, New Delhi, 1949), pp. 977-9.

<sup>2</sup> Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press, Oxford, 1966), p. 308.

## 2

## What is a Constitution?

One may ask at this stage, what is a constitution? If a study is made of the origins of modern constitutions, it will disclose that, as a general rule, they were drafted and adopted by people who wanted to make a fresh start in the form and system of their government. The desire or need for such a fresh start arose, as in the United States, because separate States holding sovereign status desired to come together under a new form of federal government. Sometimes it so happened that communities which were under foreign domination threw off the foreign yoke as a result of a war or a revolution and found themselves free to govern themselves. This is illustrated in the cases of Austria, Hungary or Czechoslovakia after 1918. Take the case of France in 1789, where a new constitution was drafted as a result of a national revolution; or, better still, the case of the U.S.S.R. where the Communist revolution had made such a complete departure from the previous forms of government that a new constitution had to be drafted by the Communist Government. In India, the arrival of political freedom necessitated the drafting of a constitution. It was not a case where different constituent states of the country were sovereign in themselves; it was a case where there was a unitary form of government under British domination and, with the removal of the British rule, the different units wanted to form a common government which they decided should be a democratic republican form of government.

The constitution, in a sense, enumerates legal rules and principles which govern the government of that country and which are the fundamental law of the land. It is indeed 'the resultant of a

parallelogram of forces—political, economic, and social—which operate at the time of its adoption.<sup>1</sup> The constitution, no doubt, is a legal document; but it is a legal document which is radically different from legal documents like contracts of sale, leases of timberland or insurance policies. According to Justice Holmes, the Constitution was not primarily a text for dialectic but a means of ordering the life of a progressive people. While its roots were in the past, it was projected for the unknown future.<sup>2</sup> . . . the provisions of the Constitution,' observed Justice Holmes, 'are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.'<sup>3</sup> On another occasion, Justice Holmes dealt with the problem in this way:

... when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.<sup>4</sup>

That being the nature of the Constitution, as observed by Nehru: 'A Constitution, if it is out of touch with the people's life, aims and aspirations, becomes rather empty: if it falls behind those aims, it drags the people down. It should be something ahead to keep people's eyes and minds up to a certain high mark.'<sup>5</sup> Dicey, in his *Law of the Constitution* (1887), has referred to the position of the Constitution in a very subtle manner. According to Dicey,

<sup>1</sup> K. C. Wheare, *Modern Constitutions* (Oxford University Press, London, 1964), p. 98.

<sup>2</sup> Felix Frankfurter, *Mr. Justice Holmes and The Supreme Court* (The Belknap Press of Harvard University Press, Cambridge, Massachusetts, Second Edn., 1961), p. 59.

<sup>3</sup> *Gompers v. United States*, 233 U.S. 604, 610 (1914).

<sup>4</sup> *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

<sup>5</sup> *Independence and After*, Jawaharlal Nehru, op. cit., p. 375.

while in England the Constitution was a product of the law of the land, in other countries the law of the land was a result of the constitution. If we study the development of the constitutional law in the contemporary world, particularly in Asia and Africa, it will be easy to appreciate the significance of Dicey's remark as to the relationship between constitution and constitutionalism.

## The Preamble and the Directive Principles of State Policy

### THE PREAMBLE

I will now address myself to the question posed by the subject I have chosen for my lectures—*What is the basic philosophy of the Constitution of India?* In trying to find an answer to this question, let me begin with the Preamble to the Constitution. The Preamble is a short statement, but its solemn significance cannot be overrated.

WE, THE PEOPLE OF INDIA, proclaims the Preamble, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all; FRATERNITY assuring the dignity of the individual and the unity of the Nation; IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

It is often said that a preamble to a constitutional document affords a key to its spirit and its meaning. This is true of the Preamble to the Constitution of India. In lucid, expressive words, it emphatically brings out the socio-economic content of political

freedom and gives an inspiring picture of the future of India, which was then beginning its career as a Welfare State. Prior to the 15th of August 1947, most of the political leaders and almost the entire Indian community entertained the fond belief that the attainment of political freedom would automatically solve all socio-economic problems which India was facing. It was then thought that political dependence was the cause of all ills and those ills would be remedied as soon as freedom arrived. When India became free, it was realized that the faith in the ability of political freedom to cure all socio-economic ills was no more than a superstition. Political freedom undoubtedly is a condition precedent for the socio-economic development of any country; but political freedom is a means and not an end. When this realization dawned in the minds of all thinking Indians, they began to inquire, what should be the socio-economic content of political freedom?

The fight for political freedom was substantially founded on strong dissent from or disapproval of foreign rule. Its positive, constructive base was not as clear to all the Indians as it should have been. The positive, constructive aspect of political freedom has to be the creation of a new social order, based on the doctrine of socio-economic justice. The feeling that political freedom, without socio-economic justice, will have no significance to the masses of the country, found its expression in the Preamble of the Constitution. In other words, the Preamble and most of the significant articles of the Constitution emphasize the fact that, for political freedom to have a meaning to the masses of India, it is essential that socio-economic justice be achieved.

In attaining the ideal of socio-economic justice, India is committed to the democratic way of life; and so the first declaration made by the Constitution is that India is a Sovereign Democratic Republic. Complete political freedom is emphasized by the word 'Sovereign' and the adoption of the democratic way of life is emphasized by the words 'Democratic Republic'. After referring to India as a Sovereign Democratic Republic, the Constitution, in the Preamble, has further declared its resolve to secure certain basic objectives to all its citizens; and amongst these basic objectives pride of place is given to social, economic and political justice. In other words, the Constitution emphatically declares that the Democratic Republic of India shall be a Welfare State committed to the pursuit of the ideal of socio-economic justice. Socio-economic justice, however, has to be attained in a democratic way by the

rule of law. Democracy inevitably postulates the significance of individual liberty and freedom. So, the next objective is liberty of thought, expression, belief, faith and worship. This, in substance, is the crux of the fundamental rights guaranteed to the citizens under Part III. Having thus enunciated the need to establish justice and to guarantee liberty to individual citizens, the Preamble also proclaims its faith in the doctrine of equality of status and opportunity to all citizens. While proclaiming its faith in these basic postulates, the Constitution has also expressed its objective to establish a sense of fraternity by which the dignity of the individual and the unity of the nation will be guaranteed. It would, I think, be fairly accurate to say that the basic philosophy of the Constitution of India is to be found, in essence, in the Preamble itself. India is one country, and there is only one citizenship in India. India is committed to the ideal of the Welfare State and must establish socio-economic justice. India is committed to democracy and respects individual liberty; and India wants to give to all its citizens equality of status and opportunity, thereby attempting to create a mighty brotherhood of Indian citizens which would assist the Sovereign Democratic Republic of India in reaching its proclaimed objectives. That, in substance, is the message of the Preamble.

This message has been translated into several Articles, dealing with its different facets in Part III (Articles 12 to 35) and Part IV (Articles 36 to 51) of the Constitution. Part III deals with Fundamental Rights and Part IV deals with the Directive Principles of State Policy. Parts III and IV, taken together, can be safely described as containing the philosophy of the Constitution. This philosophy can be described as the philosophy of the Social Service State. Both the Preamble and the Directive Principles of State Policy give evidence of the unmistakable anxiety of the framers of the Constitution to shape the Constitution as a mighty instrument for the economic improvement of the people and for the betterment of their conditions. Equally noticeable throughout the relevant provisions is their determination to achieve this result in a democratic way by the rule of law. In other words, the provisions of Parts III and IV, considered in the light of the Preamble, emphasize the need to improve the social and economic conditions of the people and to attempt that task with the maximum permissible individual freedom guaranteed to the citizens. They also emphasize that it is essential to maintain the political

unity of the country and the stability of its political life and to safeguard against the fissiparous tendencies inherent in a society made up of many different communities and castes.

#### THE DIRECTIVE PRINCIPLES

Let me now take the Directive Principles first and indicate broadly what they lay down. Before doing so, it is necessary to refer to the warning administered by Dr. Ambedkar in moving the Directive Principles for the acceptance of the Constituent Assembly.

In enacting this Part of the Constitution, the Assembly is giving certain directions to the future legislature and the future executive to show in what manner they are to exercise the legislative and the executive power they will have. Surely it is not the intention to introduce in this part these principles as mere pious declarations. It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip-service to these principles but that they should be made the basis of *all* legislative and executive action that they may be taking hereafter in the matter of the governance of the country.<sup>1</sup>

In fact, Article 37 itself provides that the provisions contained in Part IV shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. It is true that these principles are not judicially enforceable and, therefore, cannot be regarded as justiciable. But the fact that the assistance of the judicial process cannot be claimed by citizens in the enforcement of the principles laid down in this Part does not detract from the basic position that the Constitution-makers wanted the governance of the country to be founded on these principles. Whatever may be the political affiliation of the party which would come into power in future either in the States or at the Centre, it is bound to recognize the fact that the principles laid down in Part IV are intended to be its guide, philosopher and friend in the matter of its legislative and executive activities. Of course, the ultimate sanction to enforce these direc-

<sup>1</sup> *Constituent Assembly Debates*, Vol. VII, p. 476 (Government of India, Delhi). Quoted by Durga Das Basu in *Commentary on the Constitution of India*, Vol. II, Fifth Edn. (S. C. Sarkar & Sons, Private, Ltd., Calcutta, 1963), p. 312.

tive principles will proceed from an awakened public opinion; and as soon as it becomes articulate and strong, no Government can resist a demand for the due implementation of these principles by legislative and executive processes. That is what Dr. Ambedkar emphasized when he invited the Constituent Assembly to accept the provisions in Part IV.

Article 38 requires the State to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice—social, economic and political—shall inform all the institutions of national life. This provision amounts to giving a concrete shape to the relevant declaration contained in the Preamble.

Article 39 lays down the principles of policy to be followed by the State. These principles are: (a) that all citizens have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community have to be so distributed as best to subserve the common good; (c) that the operation of the economic system should be so organized as not to result in the concentration of wealth and the means of production to the common detriment; (d) that there should be equal pay for equal work for all citizens, irrespective of sex; (e) that the health and strength of workers and the tender age of children should not be abused and that citizens should not be forced by economic necessity to enter avocations unsuited to their age or strength; and (f) that childhood and youth should be protected against exploitation and against moral and material abandonment. It should be clear that these principles illustrate what the Constitution-makers had in mind when they referred to the necessity to establish social and economic justice.

Article 40 contemplates the organization of village *panchayats* and recognizes the need for decentralization, on rational principles, in the governance of the country.

Article 41 guarantees to every citizen the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 42 requires the State to make provision for securing just and humane conditions of work and for maternity relief.

Article 43 enunciates the revolutionary doctrine that employees are entitled as of right to certain reliefs. The State should secure by suitable legislation or economic organization or in any other

way to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of living, full enjoyment of leisure and social and cultural opportunities. And, in particular, the State has to endeavour to promote cottage industries on an individual or co-operative basis in rural areas. The first part of Article 43 has inspired the development of industrial jurisprudence in India ever since the Constitution was adopted.

Article 44 emphasizes the importance of introducing a uniform civil code throughout the territory of India. This is consistent with the secular character of Indian democracy. Secularism ultimately aims at introducing a common civil code throughout the country.

The vital need to make citizens educated is emphasized by Article 45, which requires that within ten years from the commencement of the Constitution, the State should endeavour to provide for free and compulsory education for all children until they complete the age of fourteen years.

The traditional composition of the Indian community, particularly the Hindu part of it, presented the very difficult problem of Scheduled Castes and Scheduled Tribes. These castes and tribes constitute the socially and economically weakest sections of the community, and the Constitution-makers were very solicitous about their economic betterment. Article 46, therefore, provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

The Constitution-makers were conscious of the need to improve the general health of Indian citizens; and so Article 47 imposed upon the State the duty of raising the level of nutrition and the standard of living and of improving public health.

Organization of agriculture and animal husbandry on modern, rational and scientific lines has been emphasized by Article 48, while Article 49 takes care to protect the heritage of India's culture by imposing on the State the obligation to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

Article 50 refers to the fundamental importance of the separation of the judiciary from the executive.

The last Article in Part IV (Article 51) shows that the Constitution-makers were fully conscious of the fact that for the proper development of India herself, and for the realization of the ultimate dream of one world, it was necessary to promote international peace and security; and so it declared that the State shall endeavour not only to promote international peace and security, but also to maintain just and honourable relations between nations; to foster respect for international law and treaty obligations in the dealings of organized peoples with one another, and to encourage settlement of international disputes by arbitration.

An examination of this Part of the Constitution would indicate that Chapter IV contains an amalgam of several subjects which can be classified under four principal groups. The first group deals with general principles of social policy. I have already indicated that the Preamble has promised to the citizens of India the establishment of justice—social, economic and political. In pursuance of this objective, Article 38 lays down a directive principle requiring the Governments in different States and at the Centre to create a social order in which this threefold justice will inform all the institutions of national life. The second group deals with the principles of administrative policy. The third one sets out socio-economic rights which constitute a very important section of the Directive Principles; and the last contains a statement of the international policy of the Republic. Thus Part IV gives a broad picture of the progressive principles on which the Constitution wants the governance of the country to be based.

It may be asked whether the enunciation of Directive Principles in such a general form serves any practical purpose. Mirkin-Guetzvitch argues that 'the value of the attempt is not diminished by the fact that in certain States social rights have merely been incorporated in the constitutional charter'. According to his view, the inclusion of declaratory principles serves an educative purpose. Besides, constitutional provisions of this kind 'define a tendency and indicate the principles of a new process of guarantee of social rights which will be effective in future'.<sup>1</sup> On the other hand, it has been argued by some constitutional thinkers that such declarations tend to remain a dead letter, unless legislatures take effective action for the transformation of the social and economic structure of the community in accordance with them. In this connection, it is

<sup>1</sup> *Les constitutions de l'Europe nouvelle*, Vol. I, p. 38.

pertinent to recall that Article 37 expressly stipulates that the principles enunciated in Part IV are 'fundamental in the governance of the country', and that clearly shows that the Constitution-makers intended that the provisions in this Part should not serve merely as decorative platitudes. That is why, dealing with the provisions contained in Parts III and IV, Nehru said:

The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering, so long our work will not be over.<sup>1</sup>

That also is the obvious implication of the provisions contained in Part IV. It is this aspect of the Constitution that Granville Austin has brought out when he observed:

The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire constitution by the aim of national renascence, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution.<sup>2</sup>

K. M. Panikkar is of the opinion that under the aegis of the provisions contained in Parts III and IV, 'the Indian Parliament has been active in the matter of social legislation, whether it be called by the Hindu Code or by another name'.<sup>3</sup> The Fundamental Rights of other constitutions may have served as well as—or even better than—those of the Indian Constitution in protecting the existing rights and liberties of the people concerned. But, says Austin, it is very doubtful if in any other constitution the expression of positive or negative rights has provided so much impetus towards changing and rebuilding society for the common good.<sup>4</sup>

<sup>1</sup> Austin, *op. cit.*, p. 26.

<sup>2</sup> *ibid.*, p. 50.

<sup>3</sup> Panikkar, *Hindu Society, the Crossroads* (Asia Publishing House, Bombay, 1955), p. 52. Quoted by Austin, *op. cit.*, pp. 114-15.

<sup>4</sup> Austin, *op. cit.*, p. 115.

As I have already indicated, the Fundamental Rights and the Directive Principles were intended to serve as an instrument for bringing about a great social revolution in India. Has this intention succeeded? Austin answers the question in the affirmative:

Briefly, the answer is yes. The purpose of a Bill of written rights is to create or to preserve individual liberty and a democratic way of life based on equality among the members of society—only in theory are rights and liberties separable from democracy. In India it appears that the Fundamental Rights have both created a new equality that had been absent in traditional Indian (largely Hindu) society and have helped to preserve individual liberty. The character of rights issues and the behaviour of human beings [being] what they are, it is the absence of comment about the state of rights in India, rather than its presence, that is significant: It is the denial of rights, not their existence, that makes news. A strong indication, therefore, of the reasonably healthy condition of civil liberties in India is the lack of criticism of their absence—and there is no reason not to attribute this in some measure to the Constitution.

The number of rights cases brought before High Courts and the Supreme Court attest to the value of the Rights, and the frequent use of prerogative writs testifies to their popular acceptance as well. The classic arguments against the inclusion of written rights in a Constitution have not been borne out in India. In fact, the reverse may have been the case. Those who argue against written rights cite public opinion as the greater safeguard of rights, but in a politically underdeveloped country like India, which also lacks the rapid communications necessary to the formation and expression of public opinion, it may be that written rights come close to being a necessity.<sup>1</sup>

There is no denying the fact that the journey which India has undertaken to reach her ideal of establishing socio-economic justice is bound to prove long and arduous, and as Selig S. Harrison has warned India that 'the most dangerous decades' lie ahead of her.<sup>2</sup> Yet, the ideas and ideals enunciated in Parts III and IV of the Constitution would serve as a beacon light to India on her march

<sup>1</sup>ibid., p. 114.

<sup>2</sup>Selig S. Harrison, *India: The Most Dangerous Decades* (Princeton University Press, Princeton, 1960), p. 5.

towards the temple of socio-economic justice. In a sense they constitute 'the myths of Indian polity through which she looks and works for a better future'. They can be described as an Instrument of Instructions, or as 'a code of reminders from the founding fathers' which would inspire every party that comes to power in India in future.<sup>1</sup>

It is remarkable that the Directive Principles as enunciated in Part IV bear a close resemblance to the Resolution which was adopted by the Indian National Congress at Karachi in 1931. The said Resolution stated that 'in order to end the exploitation of the masses, political freedom must include the real economic freedom of the starving millions'. The State was to safeguard 'the interests of industrial workers', ensuring that 'suitable legislation' should secure them a living wage, healthy conditions, limited hours of labour, and protection from 'the economic consequences of old age, sickness, and unemployment'. Women and children were also to be protected in various ways and accorded special benefits. The State was to 'own or control key industries and services, mineral resources, railways, waterways, shipping and other means of public transport'. Another item called for the reform of the systems of land tenure, revenue, and rent.<sup>2</sup> Thus, the roots of the Directive Principles may, in a sense, be traced back to this resolution of 1931.

The movement for political freedom which began in 1885 has passed through several stages and after the entry of Jawaharlal Nehru on the political scene of India it took a distinctly socialistic turn. The welfare of the common man and woman and the establishment of socio-economic justice were near Nehru's heart and the Karachi Resolution gave expression to his philosophy as early as 1931. The same ideas and principles and the same socialist ideology continued to be the distinguishing feature of Indian political life ever since the Karachi Resolution was adopted and they ultimately found expression in the provisions of Part IV. In a sense, Part IV provides an answer to the question as to what is the basic philosophy of the Constitution of India.

The ultimate object of the Directive Principles is to liberate

<sup>1</sup> M. R. Sinha (ed.), *The Struggles of Modern India* (published for the Indian Institute of Asian Studies, Bombay, Asian Studies Press, Bombay, 1967), p. 37.

<sup>2</sup> Austin, *op. cit.*, p. 56.

the Indian masses in a positive sense; to free them from the passivity engendered by centuries of coercion by society and by Nature and by ignorance, and from the abject physical conditions that had prevented them from fulfilling their best selves.

## Fundamental Rights

Part III of the Constitution, in which are enshrined the Fundamental Rights, constitutes an essential and an operative part of the philosophy of the Indian Constitution. Before I refer to these fundamental rights and discuss their relevance and materiality to the concept of India's political philosophy, I may address myself to the question of the origin of the notion of these fundamental rights.

Various theories have been advanced by jurists in regard to the origin and nature of fundamental rights. The earliest of these is the doctrine of *jus naturae*. This doctrine means that every fundamental right is inherent in man. In fact, it existed prior to the origin of the State, and the State is not competent to violate it, but must inevitably recognize and protect it. Locke and Wolff were the most prominent exponents of this theory.

This theory, however, was originally transplanted by Blackstone from the sphere of political philosophy to the sphere of jurisprudence. Blackstone lays down two basic propositions. He describes the rights as 'the absolute rights of individuals', and adds, 'we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and every man is entitled to enjoy, whether out of society or in it'. His second proposition is that the principal aim of society is to protect individuals in the enjoyment of these rights which are vested in them as immutable. This hypothesis naturally leads to the conclusion that 'the first and primary end of human laws is to maintain and regulate these absolute rights of individuals'. Accordingly, civil liberty 'is no other than natural liberty so far re-

strained by human laws, and no further, as is necessary and expedient for the general advantage of the public'.<sup>1</sup>

A modified version of this theory has found expression in some of the American decisions, which do not regard fundamental rights as rights existing in a state of nature, but as rights which are essential to the individual in a free society. In *Micky v. Kansas*<sup>2</sup> the Court observed that 'civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses'.

A fundamental right is thus a legally enforceable right governing the relations between the State and the individual. It has both a negative and a positive aspect. It must, as the words indicate, be fundamental. It does not mean merely a right of liberty permissible under the law; it also means a right of liberty in a positive sense which enables an individual to develop his personality and his faculties and to live his life in his own interest and in the interests of the community as a whole.

Fundamental rights as enshrined in the relevant articles of the Indian Constitution can be classified under three categories: (1) those that can be claimed and enjoyed by any person irrespective of his nationality; (2) those which can be claimed and enjoyed only by citizens of India; and (3) those which can be claimed and enjoyed not by individual citizens as such, but by a group of individual citizens. The object of enshrining fundamental rights in the Constitution is to sustain the proposition that the system of Government recognized by the Constitution embodies the concept of a 'limited government' i.e., a government of laws, and not of men. As Justice Jackson has observed in *Board of Education v. Barnette*,<sup>3</sup> 'the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to the vote; they depend on the outcome of no elections'.

<sup>1</sup> *Blackstone's Commentaries on the Law of England*, Vol. I, pp. 96 et seq. Third Edn. (London, 1876).

<sup>2</sup> 43 F. Supp. 734.

<sup>3</sup> (1943) 319 U.S. 624.

Let me now describe the Fundamental Rights enshrined in Part III. I will first take Articles 14, 15 and 16. These deal with the right to equality. Article 14 guarantees equality before the law or equal protection of the laws within the territory of India, and this fundamental right can be claimed by even a non-citizen residing within the territory of India. Article 15 deals with a specific application of the doctrine of equality before the law. It provides that no discrimination can be made against any citizen on grounds only of religion, race, caste, sex, place of birth, or any one of them. It also provides that no disability, liability, restriction or condition can be imposed on any citizen on any of the said grounds. Clauses (3) and (4) of Article 15 provide for exceptions to the doctrine of equality.

The effect of these two clauses is that the State can make discrimination in favour of women and children on the ground that they deserve special protection. Similarly, the State can make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. The Constitution-makers were conscious that women and children on the one hand, and members of the socially and educationally backward communities on the other, needed special protection because of their backwardness. That is why two specific clauses of Article 15 make special provision allowing the State to depart from the doctrine of the right of equality before the law in respect to them.

Article 16 deals with another category of cases which involve the application of the right to equality. It provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Clause (4) of Article 16, however, makes an exception to this principle in relation to members of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. In other words, though equality of opportunity for State employment is guaranteed under Article 16, it is open to the State to reserve certain appointments or posts in favour of any backward class of citizens, provided the State is satisfied that the said backward class is not adequately represented in its services. These then are the three Articles which enshrine the basic doctrine of the right to equality before the law.

It is necessary to explain what the right to equality means. The said right demands equal treatment of equals in equal circum-

stances. It does not, however, prohibit differentiation on a reasonable basis, which has a rational nexus with the object of the statute in question. In other words, if the object of the legislation requires some differentiation to be made in the treatment given to different classes of citizens, that differentiation would not be violative of Article 14, provided the differentiation is reasonable and there is a nexus between that differentiation and the object of the legislation. However, the rational basis which justifies the discrimination must not include grounds which have been expressly excluded by the Constitution. Besides, any legislation based on such differentiation is open to examination and review by the judiciary. The rule, therefore, has a twofold aspect: it implies parity or equal treatment of equals in equal circumstances and permits differentiation in certain specified circumstances.

Whereas Article 14 guarantees equality before the law to all persons including aliens, Article 15 and Article 16 are in their application limited to citizens, though their scope is otherwise very wide. That is one distinction between Articles 14 and 15. Another distinction between the said Articles is that when a law is challenged as violative of Article 14, there is always a presumption that the classification made by the impugned legislation is reasonable and whoever challenges the validity of the law has to prove the contrary. In regard to an alleged contravention of Article 15, there is no such presumption in favour of the validity of the classification.

The substantive aspect of this rule of equality before the law has been thus defined by the International Commission of Jurists:

The law passed by the legislature must not discriminate between human beings except insofar as such discrimination can be justified on a rational classification consistent with the progressive enhancement of human dignity within a particular society.<sup>1</sup>

The Supreme Court of India has thus explained the significance of the structure of Article 14 in *State of West Bengal v. Anwar Ali Sarkar*:<sup>2</sup>

The first part of the article, which appears to have been adopted

<sup>1</sup> International Commission of Jurists, *The Rule of Law in a Free Society* (Report on the International Congress of Jurists, New Delhi, 5-10 January 1959), p. 212.

<sup>2</sup>(1952) S.C.R. 284, 293-94.

from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India and thus enshrines what American Judges regard as the 'basic principle of republicanism'. The second part which is a corollary of the first part and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination or favouritism, or as an American Judge put it 'it is a pledge of the protection of equal laws', that is, laws that operate alike on all persons under like circumstances. And as the prohibition under the article is directed against the State, which is defined in article 12 as including not only the legislatures but also the Governments in the country, article 14 secures all persons within the territories of India against arbitrary laws as well as arbitrary application of laws. This is further made clear by defining 'law' in article 13 (which renders void any law which takes away or abridges the rights conferred by Part III) as including, among other things, any 'order' or 'notification' so that even executive orders or notifications must not infringe article 14. This trilogy of articles thus cures non-discrimination in State action both in the legislative and the administrative spheres in the democratic republic of India.

That takes us to Article 19 which deals with the right to freedom. This Article contains the essence of the democratic way of life. It guarantees seven kinds of freedom by sub-clauses (a) to (g) of Clause (1). The scheme of Article 19 is that Clause (1) enumerates seven kinds of freedom, and Clauses (2) to (6) enumerate cases in which the said rights to freedom can be regulated by the State. This scheme is consistent with the fundamental approach of Indian democracy, which is committed to the establishment of socio-economic justice in India.

The concept of the Welfare State marks a distinct improvement in the scope of the functions of democracy. It is well known that before the doctrine of the Welfare State was born, democratic governments were usually content with playing a passive role in the governance of the country. It was thought that if the government protected the frontiers of the country, repelled any threat of aggression from an external enemy and maintained law and order, it had discharged its functions adequately and well. This

view was, if one may so describe it, a nightwatchman's view or a policeman's view. This narrow view of the functions of democracy was based on some principles which were accepted universally in those days. Lord Acton emphasized the importance of liberty by making the categorical statement that liberty is not a means to a higher political end; it is in itself the highest political end.

This absolute claim on behalf of individual liberty necessarily led to the economic doctrine of *laissez faire*. Economists thought that industrial relations should be governed by the rule of the market and the free interplay of economic motives must not be interrupted. Social scientists and philosophers like Mill propounded the theory that the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection; that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. According to Mill, the only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Mill went so far as to assert that all restraint, *qua restraint*, is an evil. That is why governmental efforts to make education compulsory appeared to Mill to be open to serious objection, because they interfered with the natural right of the parent to decide whether or not his child should be educated and, if yes, how.

A Welfare State like India does not subscribe to this philosophy. It recognizes its obligation to assist the socially and economically weaker sections of the community in their struggle for the betterment of their lot. It refuses to be a mere onlooker in socio-economic struggles which result from tensions, and it deems it a part of its duty to remove the socio-economic imbalance which disturbs social and economic peace from time to time. Unlike the passive democracy which believes that in all struggles resulting from socio-economic imbalances, government is concerned to keep the ring clear, the Welfare State deems it to be its duty to enter the arena, if necessary, and to regulate socio-economic affairs with a view to introducing an element of socio-economic justice in the structure of the society and its relations. This process of introducing socio-economic justice is attempted by the Welfare State with the help of the law. It is in that context that the law becomes a mighty weapon in the hands of democracy.

The Indian Constitution seeks to discover a rational synthesis between individual freedom, which is guaranteed by Article 19(1), and claims for the public good. Individual freedom and the fundamental rights pertaining to it which are guaranteed by Article 19(1) are, according to the Indian Constitution, not absolute. The liberty of the individual is no doubt important and can even be regarded as an essential feature of Indian democracy. But where the right of the individual is in sharp conflict with claims for the public good, the former has to yield to the latter and must submit to regulation. The public good is the end, and the achievement of the public good has to be attempted by the rule of law; in this attempt a synthesis has to be evolved between the two conflicting claims of individual liberty and public good. That is the scheme of Article 19, and so we find that whereas Article 19(1) enunciates seven kinds of rights to freedom, Clauses (2) to (6) of the said Article enumerate the circumstances under which and the manner in which the said rights can be regulated.

The seven rights to freedom recognized by Article 19(1) are the right (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (f) to acquire, hold and dispose of property; and (g) to practise any profession, or to carry on any occupation, trade or business. Let me now refer to the remaining clauses, which provide for the regulation of these fundamental rights.

Take the case of freedom of speech and expression. Under Clause (2) this freedom can be regulated by the State by making any law in so far as such law imposes reasonable restrictions on the exercise of the said right in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. It will be noticed that the grounds on which freedom of speech and expression can be regulated by legislation are all intended to serve the public good; and so, if a law is made regulating and restraining the right to freedom of speech and expression in order to secure any one of the objects specified in Clause (2), the validity of the law cannot be effectively challenged. That shows how the Constitution seeks to establish a synthesis between the right to freedom of speech and expression and the public good.

Similarly, the right to assemble peaceably and without arms can be regulated by a law which is intended to serve the interests of the sovereignty and integrity of India or public order (Clause (3)). Likewise the right to form associations or unions can be regulated by a law which is intended to serve the interests of the sovereignty and integrity of India or public order or morality (Clause (4)). Clause (5) provides that the rights to move freely throughout the territory of India, to reside and settle in any part of the territory of India and to acquire, hold and dispose of property can be regulated by a law in so far as it is intended to serve the interests of the general public or the protection of the interests of any Scheduled Tribe. And under Clause (6) the right to practise any profession, or to carry on any occupation, trade or business guaranteed by sub-clause (g) of Clause (1) can be restrained by any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the said right 'and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to:

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise'.

I ought to make it clear that the synthesis between individual rights and the public good is thus attempted to be achieved by Clauses (2) to (6) by providing a yardstick to test the validity of the laws that seek to regulate fundamental rights. The first test is that the object of imposing the restriction on the fundamental rights must be shown to be for the public good, or must be shown to fall under any of the other grounds indicated in Clauses (2) to (6); and the second test is that the restriction imposed by the impugned legislation must be reasonable. It is only when the courts are satisfied that these two conditions precedent for the regulation of fundamental rights are satisfied that the law can be held to be valid. The last word on this subject is left to the courts. It will thus be seen that the concept of the Welfare State which has been accepted by the Indian Constitution is sought to be implemented by this process of synthesis and in this process

of synthesis the judiciary has to play a major role. This position has been explained by the Supreme Court of India in these words:

There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country to be essential to the safety, health, peace, general order and morals of the community. . . . Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. . . . What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control—Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality.<sup>1</sup>

I have already indicated that the restriction or regulation of fundamental rights has to be reasonable; and in deciding whether any impugned restriction or regulation is reasonable, the court is required to make an assessment which is not always easy to make. In *State of Madras v. V. G. Row*,<sup>2</sup> the Supreme Court of India has dealt with this problem in these words:

It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is

<sup>1</sup> *Gopalan v. State of Madras*, (1950) S.C.R. 86.

<sup>2</sup> (1952) S.C.R. 597, p. 607.

reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

#### GENESIS OF FUNDAMENTAL RIGHTS

Having referred to the Fundamental Rights as guaranteed by Article 19, I may very briefly indicate the genesis and growth of these fundamental rights which are otherwise described as the Bill of Rights. The position in England in respect of these fundamental rights has been thus described by Lord Wright:

There is no written constitution and no courts as its guarantee. Our liberties are at the mercy of Parliament. The only safeguard against abuse by Parliament of its powers is to be found in the democratic principles of free election, free speech, free discussion, freedom of the assembly and the like, in short in the instincts of a free people.<sup>1</sup>

However, it must be added that basic human rights are scrupulously protected in English public life and whenever there is a breach, strong public resentment is expressed in no ambiguous terms. The public conscience in England is so articulate that the liberties of citizens are adequately protected even though there is no written constitution.

How did the concept of the Bill of Rights originate in England, it may be asked? According to Holdsworth, Magna Carta 'stands at the head of those two or three documents which contain, or are supposed to contain, some of the fundamental principles of the British Constitution. Lawyers, historians and politicians of every period of our history have interpreted it from the standpoint of every period of that history. From this point of view we may compare it to the Twelve Tables'.<sup>2</sup> According to McKechnie 'the

<sup>1</sup> 2 *Cambridge Law Journal*, 1949, p. 2.

<sup>2</sup> W. S. Holdsworth, *A History of English Law*, Vol. II, Third Edn., (Methuen and Co. Ltd., London, 1923), p. 209.

greatness of *Magna Carta* lies not so much in what it was to its framers in 1215, as what it afterwards became to the political leaders, to the judges and the lawyers, and to the entire mass of the men of England in later ages'.<sup>1</sup>

Chronologically, the next constitutional charter was the Petition of Right of 1628. As its preamble states, it concerns 'diverso rights and liberties of the subjects', and it declares several rights such as, (1) that no man be compelled to pay any tax 'without common consent by act of Parliament'; (2) that no man shall be imprisoned or detained except in accordance with the laws and statutes of the realm; (3) that the billeting of soldiers and sailors shall be abolished; (4) that commissions for proceedings by martial law shall be revoked and annulled. The requests made in the Petition of Right were intended to preserve the 'rights and liberties according to the laws and the statutes of this realm'.

The next constitutional declaration, the Bill of Rights of 1689, is expressly described as 'an Act declaring the rights and liberties of the subject'. These three declarations were the forerunners of what is now described as the Bill of Rights. It is true that these declarations dealt with the rights of individuals as such and were not concerned with the rights of members of any collective group and they did not speak of these rights as the natural or imprescriptible rights of man, but described them as the positive rights of persons who owed allegiance to the Crown.

Then followed the Virginia Declaration of 1776. As Professor Goodhart has observed, '*Magna Carta* crossed oceans in the 17th and 18th centuries because the colonists brought these documents with them'.<sup>2</sup>

So far as the Constitution of the United States is concerned, as originally adopted on the 4th of March 1789, it did not contain any declaration of fundamental rights. It was in the first ten Amendments brought before the Congress held on the 25th of September 1789, that they were introduced and they were finally ratified in December 1791. The result of these amendments has been thus described by J. Frankfurter, in *Dennis v. United States*:<sup>3</sup>

<sup>1</sup> McKechnie, *Magna Carta* (James Maclehose & Sons, Glasgow, 1905), p. 436 et. seq.

<sup>2</sup> Sirdar D. K. Sen, *A Comparative Study of the Indian Constitution*, Vol. II (Orient Longmans, Calcutta, 1966), p. 126.

<sup>3</sup> 341 U.S. 494.

The first ten Amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our British ancestors.

I may, however, point out that two of the Amendments—the Ninth and Tenth—have nothing to do with the rights and privileges of citizens. The Ninth Amendment lays down a general rule of interpretation that the enumeration of certain rights in the Constitution shall not be construed to deny or disparage others retained by the people. The Tenth Amendment merely vests residuary powers in the State or in the people and does not enunciate or reaffirm any fundamental right.

In 1862, the Fourteenth Amendment was ratified by the States and it made an important addition to the Bill of Rights. This Amendment imposes restrictions on the authority of the States to interfere with the rights of the individual. The following prohibition included in this Amendment is significant:

No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court of the United States, in *Munn v. Illinois*,<sup>1</sup> has described the significance of this Amendment in these words:

While this provision of this Amendment is new in the Constitution as a limitation upon the power of the States, it is old as a principle of civilised government. It is found in Magna Carta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union.

The French Constituent Assembly gave its final approval to a Declaration of Rights on the 27th of August 1789. This Declaration has become the source of the charters of liberties not only on the continent of Europe but also in other parts of the world. This Declaration contains not only specific provisions guaranteeing

<sup>1</sup>(1876) 94 U.S. 123.

several rights to citizens, but has also included general statements of a philosophic nature.

Professor Colliard has pointed out that 'the Declaration passed beyond the cadre of purely juridical work of the Assembly. It is an expression of a worldwide coconception and summarizes the philosophy of eighteenth century France. The Assembly considered it necessary to recognize and declare fundamental rules valid for all human societies. The rights thus simply declared and established were natural rights: they belonged to man as a human being, and partaking of his character they were sacred and inalienable'.<sup>1</sup>

It may not be unreasonable to assume that this Declaration was the source and origin of all Bills of Rights in European countries. However, there is one point which must not be forgotten. The French Declaration did not purport to create any right which could be enforced by law; it merely laid down general principles which should be applicable to the whole human race and should serve as a bulwark against the danger of restoration of absolute government and the rights of privileged classes.

After the first World War, there has been a double trend in the evolution of the doctrine of the Bills of Rights. As the said rights were originally conceived, they proceeded on two basic postulates. The first was that the individual must be allowed the maximum liberty in order to ensure the maximum development of his life and activities. The second was that the liberty of the individual can be restricted only for the purpose of protecting the same kind of liberty of others. After the first World War and particularly after the second World War, principles of socialism and socio-economic justice became articulate and the rule of unrestricted individualism has had to submit to increasing limitations on individual rights in the general interests of the community as a whole. As an eminent publicist has observed, the new constitutions framed after the two World Wars were formulated at a time when social questions could not be ignored and the social sense of law was no longer a theory but life itself. Hence two simultaneous processes have taken place. On the one hand, protection of the social person had gradually begun to feature among fundamental rights. On the other hand, in the name of solidarity and public

<sup>1</sup> Colliard, *Libertés publiques*, Chap. II (Paris, 1959).

order, fresh limitations have been imposed on these rights.<sup>1</sup>

Before parting with the topic of the Bill of Rights, I would like to refer to the question of monopolies in trade to which Article 19(6) refers. At this stage, I do not propose to go into the history of the amendment of Article 19(6). I shall content myself with the observation that when trade monopolies were attempted to be established by the State, as for instance in the case of road transport, the validity of the State's action was challenged and sometimes the challenge succeeded. That led to the amendment of Article 19(6). Dealing with the effect of the amendment, the Supreme Court observed that the task of construing important constitutional provisions like Article 19(6) cannot always be accomplished by treating the said problem as a mere exercise in grammar. In interpreting such a provision, it is essential to bear in mind the political or the economic philosophy underlying the provisions in question, and that would necessarily involve adoption of a liberal and not a literal and mechanical approach to the problem.<sup>2</sup>

The Court took the view that the amendment made by the Legislature showed that according to the Legislature, a law relating to the creation of a State monopoly should be presumed to be in the interests of the general public, and it proceeded to say that the theory underlying the amendment appeared to be doctrinaire and not pragmatic; that is why the question about the validity of the laws covered by the amendment was no longer left to be tried in the Courts. This indicates that the Constitution-makers wanted the Courts to assume that *prima facie* State monopolies which fell under Article 19(6) were reasonable and for the public good. This amendment shows how the Indian Constitution wants principles of socio-economic justice to be effectively introduced by legislative measures.

The right to freedom has another important aspect and that is in relation to freedom from criminal process. The Indian Constitution has made provisions to guarantee freedom in this behalf. Articles 20, 21 and 22 deal with this topic. Article 20 affords protection in respect of conviction for offences, and it provides that no person shall be convicted of any offence except for violation of

<sup>1</sup> Ollero, *El derecho constitucional de la postguerra* (Barcelona, 1949). Quoted by Sen, *op. cit.*, pp. 134-5.

<sup>2</sup> *Akadasi Padhan v. State of Orissa* (1963) Supp. 2 S.C.R. 691.

a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It will be noticed that this provision negates the idea of retrospective penalization for acts. It also prohibits retrospective enhancement of punishment. Having provided this protection against improper conviction, Article 20 lays down another important rule and that is that no person shall be prosecuted and punished for the same offence more than once. It also gives a guarantee to every citizen that he shall not be compelled to be a witness against himself.

This fundamental right naturally leads to the corollary that a person can be prosecuted or punished under the law of the land; and that is what Article 21 provides. It lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 22 provides protection against arrest and detention in certain cases. Article 22(1) provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult, and be defended by, a legal practitioner of his choice. Article 22(2) lays down that every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

By way of exception to this rule, two cases are contemplated by clause (3). Any person who for the time being is an enemy alien is not entitled to this protection; nor is any person who is arrested or detained under any law providing for preventive detention entitled to this protection. This provision naturally leads to Clauses (4), (5), (6) and (7) of Article 22, which deal with the problem of preventive detention. This is how these Clauses read:

(4) No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of

three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of Clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of Clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in Clause (5) shall require the authority making any such order as is referred to in that Clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of Clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of Clause (4).

The presence of these clauses in the constitutional document has caused misgivings in the minds of many constitutional lawyers in India. These provisions are partly the legacy of the past and are partly the result of apprehensions caused by the explosion of violence and communal disturbances which shook the country soon after partition was effected between India and Pakistan. The Constitution-makers seem to have felt that a provision for preventive detention without holding a criminal trial according to the ordinary procedure prescribed by law would be permissible having regard to the unusual circumstances through which the country had passed

after her partition into India and Pakistan; and so they have attempted to mitigate the objectionable character of such detention by providing for what they thought to be adequate safeguards in that behalf. Nevertheless, detention of a person without a proper trial is on principle inconsistent with the rule of law and cannot easily receive the approval of a democratic conscience. It is the hope of all democrats and constitutional lawyers that Parliament may, in the near future, remove the relevant provisions pertaining to detention without trial.

That takes us to the right to freedom of religion; and this marks the most distinguishing feature of Indian democracy: its faith in secularism. Articles 25 and 26 deal with this right. Article 25 provides for the freedom of conscience and free profession, practice and propagation of religion. This freedom, however, is made expressly subject to public order, morality and health and to the other provisions of Part III. This freedom also does not affect the operation of any existing law or prevent the State from making any law—(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Article 26 guarantees to every religious denomination, or any section thereof, freedom to manage its religious affairs. This freedom includes the right (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law. This freedom again is subject to public order, morality and health but, unlike the freedom guaranteed by Article 25, not subject to the other provisions of Part III. The right to freedom of religion which is enshrined in these two Articles has to be read along with Article 14 and Articles 15 and 16, which prohibit discrimination on the ground of religion.

Let me now explain what the concept of secularism as envisaged by these two Articles really means. It is significant that the word 'secularism' does not occur in either of these Articles; but the spirit of secularism permeates all the material provisions of the Constitution. The Constitution-makers realized that in a multi-religious community such as the Indian community, secularism alone was consistent with a true democratic spirit. India is not a theocracy; it is a secular democracy. India has no State religion

as such. Hindus are undoubtedly a majority community in India. Even so, Hinduism is not the State religion of India. The Indian Constitution respects all religions alike and it lays down that, so long as religions function within their respective legitimate spheres, the Constitution is religiously neutral in regard to them. It is perhaps not unlikely that the Constitution-makers avoided the use of the word 'secularism' because the concept of secularism, as it developed in Europe in the nineteenth century, was anti-religion and anti-God.

Indian secularism, it is necessary to emphasize, is not anti-God or anti-religion. It recognizes the fact that religion serves a very important purpose in human life. But it subscribes to the fundamental Hindu philosophical tenet that all religions have elements of truth and no religion can claim the monopoly of truth. From ancient times Hindu philosophers have consistently proclaimed that all religions lead to God and, unlike some other religions, Hinduism has never put forth the claim that it alone is the true religion. This spirit of tolerance is the foundation of the theory of Indian secularism, which therefore treats all religions alike and does not expect any citizen to believe that one religion is better than another.

This belief is well illustrated by the edict of Asoka, the enlightened emperor, whose dominion in ancient times (circa 273-233 B.C.) spread over a substantial part of India:

The increase of spiritual strength is of many forms.

But the root is the guarding of one's speech so as to avoid the extolling of one's own religion to the decrying of the religion of another, or speaking lightly of it without occasion or relevance. As proper occasions arise, persons of other religions should also be honoured suitably. Acting in this manner, one certainly exalts one's own religion and also helps persons of other religions. Acting in a contrary manner, one injures one's own religion and also does disservice to the religions of others.

One who reveres one's own religion and disparages that of another from devotion to one's own religion and to glorify it over all other religions, does injure one's own religion most certainly.'

<sup>1</sup> Jawaharlal Nehru, *India Today and Tomorrow* (Azad Memorial Lectures, Indian Council for Cultural Relations, New Delhi, 1960), pp. 43-5.

Therefore, it is not surprising that the Indian Constitution does not permit any religion to enter the area which is secular or civil in character. Secular matters and civil problems have to be dealt with according to reason and according to the basic values of democracy. In the discussion and decision of these matters, religion is entirely irrelevant. The problems which Indian democracy has to face are many and complex. But Indian democracy is determined not to allow any religious consideration to trespass into the discussion of these problems. Citizenship in India is a purely secular concept and so the rights and obligations of citizenship are equally secular. There is no second-class citizenship in India. All citizens are equal; all of them are entitled to the same fundamental rights and, by obvious implication, are subject to the same fundamental obligations. All of them must be loyal to the Constitution and are equally bound by it.

This will be clear when it is remembered that the freedom guaranteed by Article 25 is made expressly subject to public order, morality and health and to the other provisions of 'this Part', meaning the Part dealing with fundamental rights. In other words, if under the guise of exercising freedom of conscience or religion, any citizen performs an act which is inconsistent with public order, morality, health or any fundamental right guaranteed to other citizens in the country, his act will not be protected by Article 25. Religion, therefore, either in theory or in practice or in propagation must not contravene public order, morality, health and the other fundamental rights guaranteed by Part III. This is made expressly clear by the provisions of Clause (2) of Article 25, because this clause provides that the State can make laws regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice and yet their validity cannot be impeached on the ground that they contravene the freedom of religion. Similarly, if a measure of social reform or social welfare is introduced in any Legislature, it cannot be attacked on the ground that it offends against any religious tenets, beliefs or practices.

It is the proud boast of Indian democracy that, ever since India attained political freedom, she has been making a consistent, dedicated effort to evolve the doctrine of secularism and to bind the whole Indian community by the feeling that whatever their religions may be, they belong to one brotherhood of India's citizens. An eloquent illustration of this concept of secularism is provided

by Article 17. This Article abolishes 'Untouchability' and lays down that the enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with the law. 'Untouchability' is a special feature of the practice of traditional Hinduism. A large number of Hindus who belonged to the economically and socially weaker strata were treated as untouchables and this practice was traditionally believed to be based on certain ancient texts. Nevertheless, the Constitution has specifically provided that the practice of untouchability is hereafter completely barred. No one would be allowed to say that because the practice of untouchability purports to derive some sanctity or assistance from ancient texts, the law cannot intervene to prohibit it. That is where the doctrine that fundamental rights prevail over religion operates.

Similarly, the passing of the Hindu Code which deals with matters pertaining to personal law applicable to the Hindus, is also an illustration of Indian secularism. Though some provisions of Hindu Law purported to derive authority from religious texts, the Hindu Code was passed by Parliament in order to place the provisions of personal law on a rational, modern and scientific basis and nobody is allowed to challenge the validity of the Code on the ground that its provisions are inconsistent with Hindu religion. It is in the same spirit of secularism that the Constitution has provided in Article 44, as one of the directive principles of State policy, that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. This directive principle still remains to be implemented. But Indian democracy is naturally careful in this matter and would hesitate to take the step of adopting legislative processes to translate this directive principle into an actuality until Muslim public opinion is sufficiently educated and awakened and appreciates the need for the introduction of a common code. That, in substance, is the basis of India's claim to be a secular democracy.

There is another aspect of freedom guaranteed by Part III, and that has relation to cultural and educational rights. Articles 29 and 30 protect the interests of minorities in that behalf. Minorities are given a right to establish and administer educational institutions of their choice, and a constitutional guarantee has been given to each minority to preserve and sustain its distinct language, script or culture.

The fundamental right that still remains to be considered is

the right to property. The constitutional provision in regard to the right of property as it originally stood has undergone several material changes, and one of the main points on which Parliament thought it necessary to intervene by making suitable amendments from time to time centred round the question as to whether compensation which the Legislature may decide to award for the acquisition of property is a justiciable issue or not. It appears that the Constitution-makers, when they drafted Article 31, assumed that the adequacy of compensation would not be treated as justiciable. But, on the interpretation of the words used in Article 31, High Courts and the Supreme Court took a contrary view and that led to the amendment of this Article on four occasions.

It will be recalled that the Preamble to the Constitution has proclaimed unequivocally that one of its objectives was the attainment of social and economic justice. In fact, as I have already mentioned, this objective was emphasized by Article 38, which provides that the State shall strive to promote the welfare of the people by securing a social order in which social and economic justice shall inform all the institutions of national life. Article 39 goes one step further and provides that the State ought to direct its policy to secure that the ownership and control of the material resources of the community are so distributed as best to subserve the common good, and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Under Article 46, the State has been enjoined to take special care of the economic interests of the weaker sections of the people.

In implementing these directive principles it was inevitable that the State would have to impinge substantially on the rights of property and trade of the citizens, and in drafting Article 31 it was fondly hoped by the Constitution-makers that the infringement of the rights of property vesting in the citizens, which legislation would inevitably involve in giving effect to the relevant directive principles, would not become an issue to be tried in courts. However, when it was discovered that the courts interpreted Article 31 as giving them jurisdiction to consider whether compensation offered by the relevant impugned legislation was adequate or was just illusory, it became necessary for Parliament to make amendments in order to give effect to the directive principles. The problem before Parliament at that stage was whether to treat the fundamental rights including the right to property as inviolable

and on that basis come to the conclusion that the directive principles cannot be given effect to, or whether fundamental rights guaranteed by the Constitution, though important, can if necessary, be restricted so as ultimately to give effect to the directive principles. Since Article 37 itself has emphatically laid down that though the directive principles are not justiciable, they are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply those principles in making laws, Parliament decided to give effect to this provision and make suitable amendments in the Constitution.

I do not propose to enter into a detailed discussion as to how these amendments were made from time to time, how they came to be interpreted by the Supreme Court and how ultimately Parliament had to intervene to bring this controversy to an end. I will content myself with reproducing Article 31 as it stood before 27th of April 1955, and as it stands thereafter.

**Before 27th of April 1955**

**RIGHT TO PROPERTY**

**Compulsory acquisition of property**  
31. (1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

**After 27th of April 1955**

**RIGHT TO PROPERTY**

**Compulsory acquisition of property**  
31. (1) No person shall be deprived of his property save by authority of law.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

(3) No such law as is referred to in Clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of Clause (2).

(5) Nothing in Clause (2) shall affect—

- (a) the provisions of any existing law other than a law to which the provisions of Clause (6) apply, or
- (b) the provisions of any law which the State may hereafter make—
  - (i) for the purpose of imposing or levying any tax or penalty, or
  - (ii) for the promotion of public health or the prevention of danger to life or property, or
  - (iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certifi-

(3) No such law as is referred to in Clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of Clause (2).

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- (a) the provisions of any existing law other than a law to which the provisions of Clause (6) apply, or
- (b) the provisions of any law which the State may hereafter make—
  - (i) for the purpose of imposing or levying any tax or penalty, or
  - (ii) for the promotion of public health or the prevention of danger to life or property, or
  - (iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and

sification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of Clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of Clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

When Article 31 was originally adopted in the Constitution, broadly stated, it embodied the English concept of private property and the rights appurtenant to it; the original draft of Clauses (1) and (2) was really based on the provisions of sub-sections (1) and (2) of section 299 of the Government of India Act, 1935. Certain improvements were, however, made, but they are not of much materiality in relation to the point I am discussing. For instance, in Clause (2), the word 'movable' was specifically added in order to avoid any ambiguity as to whether the said clause would apply to movable property or not. Likewise, in addition to 'acquisition', 'requisition' also was included expressly in the said clause in order to avoid any possible argument that requisition fell outside the said clause. For the words 'provides for payment of compensation' which occurred in section 299, the words 'provides for compensation' were used and for the words 'to be determined', the words 'to be determined and given' were used in the Constitution.

Shortly after the commencement of the Constitution, laws enacted by the State legislatures for the abolition of *Zamindari* (which means proprietorship in land as introduced by the Permanent Settlement of 1793) were challenged in the various High Courts on the ground that the provisions made therein offended against the fundamental rights guaranteed by Articles 14, 19 and 31. At this stage I ought to emphasize the fact that during the period of struggle for political independence the Indian National Congress had consistently agitated for the abolition of *Zamindari*. The economic programme adopted by the Indian National Congress always emphasized that the land must ultimately go to the tiller and absentee-landlordism and the system of intermediaries who exploited the tillers should be brought to an end.

This programme was in fact given a place of pride in the election manifesto issued by the Congress Party on the eve of the first general elections. Therefore, when Parliament discovered that

the basic idea of agrarian reform was open to serious challenge on the ground that adequate compensation is not paid to those whose titles are divested, they had to consider the problem very carefully. If adequate compensation assessed according to the principles laid down by the Land Acquisition Act was required to be paid for the abolition of *Zamindari*, it would have imposed upon the States a liability which they might never have been able to bear. The choice then was either to enforce the economic policy of the Congress and amend Article 31, or to submit to the inviolability of the fundamental rights and give up the main plank in the economic programme itself. Naturally enough the Congress Party decided to adopt the first alternative, and that led to several amendments. The amendments made in this manner could only be prospective and they could, therefore, protect only future legislation. What about the past legislation which had been passed and which had been struck down either by the different High Courts or by the Supreme Court? In order to validate such State Acts the Amendment Act of 1951 inserted Article 31B and the Ninth Schedule specifically enumerating such Land Reform Acts and immunizing them retrospectively against any challenge in respect of their constitutionality on the ground that they had contravened any of the fundamental rights. This amendment was upheld by the Supreme Court and that materially assisted the efforts made by different Legislatures to bring about the much-needed agrarian reform.

The idea of protecting particular classes of legislation which was necessary for the economic development of the nation from constitutional invalidity on the ground of the invasion of fundamental rights guaranteed by Articles 14, 19 and 31 was adopted even on future occasions, and additions came to be made in the Ninth Schedule from time to time after making appropriate changes in Article 31A.

Let me now state very briefly the scope and effect of Article 31 as it now stands. Subject to the exceptions specified in the Article, it affords protection to private property. It provides that the Legislature can transfer to the State the ownership or possession of an individual's property only if there is a public purpose to justify the transfer and compensation is paid to the owner. It is, however, now clear beyond any doubt that the question about the adequacy of compensation awardable under the relevant provisions of laws relating to acquisition or requisitioning of properties is no longer

justiciable. The result is that there is only one ground on which the validity of such laws can now be challenged, and that is, that the impugned law does not provide for the payment of any compensation at all.

The protection guaranteed by this Article extends to property of any kind, belonging to any person, provided it is situated within the territorial jurisdiction of India. It is not confined to citizens of India only and it extends to companies incorporated out of India, provided they own property in India. The effect of the different clauses of Article 31 can now be briefly summarized.

Under Clause (1) of Article 31, private property can be taken only in pursuance of the law. In other words, a person cannot be deprived of his property by executive fiat. Clause (2) imposes two further limitations on the Legislature itself. There is a prohibition against making a law authorizing expropriation unless it be for public purposes and on payment of compensation. But what is significant is that the adequacy of the compensation is no longer justiciable. Clause (2A), however, lays down that where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned by the State, Clause (2) will be inapplicable. Clause (3) adds another fetter on State laws which are enacted on the subject of acquisition of private property. Clause (5) is a saving clause. It excludes the application of Clause (2) to laws made on certain subjects, such as laws made in the exercise of the 'police powers' of the State and of the power of taxation. Under Clause (6), laws enacted within 18 months prior to the commencement of the Constitution are taken out of the scope of Clause (5)(a) and it makes separate provisions regarding such laws. Just to complete my narrative on this subject, I will, at this stage, quote Article 31A as it stood on the 18th of June 1951, and as it stands after the 27th of April 1955.

As introduced on 18th of June 1951

*Saving of laws providing for acquisition of estates, etc.*

31A. (1) Notwithstanding anything in the foregoing provisions of this Part, no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is incon-

After 27th of April 1955

31A. (1) Notwithstanding anything contained in article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

sistent with, or takes away or abridges any of the rights conferred by, any provisions of this part:

- (b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
- (c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
- (d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or
- (e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31:

Provided that where such a law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received assent.

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the

ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

(2) '(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

- (i) any *Jagir*, *inam* or *muasi* or other similar grant and in the States of Madras and Kerala, any *Janmam* right;
- (ii) any land held under *ryotwari* settlement;
- (iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans.'

(b) the expression rights, in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue

(b) the expression rights, in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, *railayat*, under-*railayat* or other intermediary and any rights or privileges in respect of land revenue.

I have already referred to Article 31B and the purpose which it was intended to serve. Here is Article 31B:

31B. Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

The extent of the conflict which arose between the policy of Parliament in the matter of agrarian reform and the difficulties created by judicial decisions in giving effect to it can be appreciated if it is realized that the Ninth Schedule, which purports to protect impugned laws from challenge in Courts, includes as many as 64 laws and they come from almost all the States in India. In short, as a result of the amendments made in Article 31 from time to time, Parliament has attempted to give effect to the important policy of agrarian reform, to which the Congress was committed for many years.

#### THE RIGHT TO WORK AND INDUSTRIAL JURISPRUDENCE

I have already indicated that some of the Directive Principles enshrined in Part IV are intended to serve as the foundation of industrial jurisprudence in India. Let me briefly recall these principles. Article 39 provides that all citizens have the right to adequate means of livelihood, that there should be equal pay for equal work for both men and women, that the ownership and control of the material resources of the community should be so distributed as best to subserve the common good. Article 41 lays down that the State shall make effective provision for securing *inter alia* the right to work to all its citizens; and Article 43 imposes on the State the obligation to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. These basic principles are the foundation of India's industrial jurisprudence.

The importance of healthy and proper development of industrial law in a democratic country can hardly be exaggerated. It is plain that for the economic development of the country and for the establishment of socio-economic justice, industrial progress must not be hampered by disharmony or discord between Capital and Labour. Conflicts are likely to arise occasionally between employers and employees; but these conflicts must be resolved by industrial adjudication by the application of tests which are objective, impersonal and fair. In the final settlement of industrial disputes, industrial adjudication must bear in mind that both capital and labour have ultimately to serve the good of the general community. Before advertiring to the relevant features of industrial juris-

prudence, which is founded on the constitutional right of every citizen to have work and to be able to enjoy life, liberty and happiness, I shall refer to the difficulties through which the development of trade unionism had to pass both in England and in the United States.

Let me take the case of England first. In the early Victorian days in England when economic individualism prevailed, the law of supply and demand was the only law recognized by the employer in relation to the employment of industrial labour. Attempts made by industrial employees to strike a collective bargain with their employer were then treated as conspiracies in restraint of trade, and hence punishable as a criminal offence under the common law. The Combination Acts of 1799 and 1800 of the United Kingdom unequivocally declared that trade combinations were unlawful and were to be dealt with as criminal conspiracies. In 1824 the Combination Acts were repealed. However, the very next year a law was passed in an amended form so as to impose heavy penalties for intimidation, molestation or obstruction of workers who were prepared to work in the face of any ban imposed by the trade union, and this virtually paralysed all trade union activity.

It was in 1858 that an Act was passed which made it lawful for strikers peacefully to persuade others to withdraw from work. Later, a Royal Commission was appointed in 1867 to consider the problem of trade unionism comprehensively, and after it submitted its report in 1871, the Trade Unions Act of 1871 was passed. It was this enactment which gave trade unions in the United Kingdom their charter. In their *History of Trade Unionism*, the Webbs have pithily described the growth of trade unionism in England. The unions, they observed, 'had grown up in despite of the law and the lawyers, which as regards the spirit of the one and the prejudices of the other were, and still are, alien and hostile to the purposes and collective action of the Trade Societies. The danger of any member having power to take legal proceedings, to worry them by litigation and cripple them by legal expenses, or to bring a society within the scope of the insolvency and bankruptcy law, becomes very apparent.'<sup>1</sup> It will thus be seen that before the trade unions came into their own, they had to pass through a severe struggle for many years in England.

<sup>1</sup> Quoted by D. N. Pritt and Richard Freeman, *The Law versus the Trade Unions* (Lawrence & Wishart, London, 1958), p. 124.

In the United States the position was substantially similar. There too the trade union movement had its trials and tribulations before it was accepted first as a necessary evil and later exalted into the position of a pillar of democracy itself. The theory of conspiracy derived from common law prevailed also in the States and created a stubborn bar against the growth of trade unionism. In 1842, Chief Justice Shaw of the Massachusetts Supreme Court however showed considerable imagination and vision when he attempted to restrict conspiracy cases by laying down that a strike for closed shop was legal if conducted in a peaceful manner and that a union was indictable for conspiracy only if the goal, or the means of attaining it, was unlawful.

The conflict between industrial workmen and their employers often led to bloody fights. Later, the employers resorted to the judicial process of injunctions to thwart the activities of trade unions and a large number of injunctions used to be issued in that way. Ultimately, in 1932, the Norris La Guardia Act was passed and this Act imposed severe restrictions on the issue of injunctions. In 1935, the trade unions received full freedom of action for collective bargaining as a result of the National Labour Relations Act, 1935. This Act is popularly known as the Wagner Act.

The history of the trade union movement in India, on the other hand, affords a very pleasant contrast. The growth of trade unionism did not have to go through the ordeal of bloody conflict or even severe penalties such as imprisonment. The Trade Unions Act was passed as early as 1926 (Act XVI of 1926), and in substance it recognized the legality and the validity of the trade unions. This was followed by the Industrial Employment (Standing Orders) Act of 1946. This Act made it necessary for the industrial employers to standardize the terms and conditions of the employment of industrial labour. And then followed the Industrial Disputes Act of 1947. This last Act can, in a sense, be said to be the foundation of industrial law in this country. As a result of the material provisions of this Act, industrial disputes are generally referred to industrial tribunals for their decision and in course of time these tribunals have built up the industrial jurisprudence of the land.

After the Constitution was passed, the Supreme Court of India played a major role in standardizing, within legitimate limits, material concepts of industrial jurisprudence. The trend of the

decisions of the Supreme Court on questions pertaining to Industrial jurisprudence is best illustrated by its observations in *Rai Bahadur Diwan Badri Das v. Industrial Tribunal*.<sup>1</sup> Dealing with the doctrine of the freedom of contract in ordinary law the Court observed:

The doctrine of the absolute freedom of contract has thus yielded to the higher claim for social justice. Take, for instance, the case where an employer wants to exercise his right to employ industrial labour on any wages he likes. It is not unlikely that in an economically underdeveloped country where unemployment looms very large for industrial work, employees may be found willing to take employment on terms which do not amount to a minimum basic wage. Industrial adjudication does not recognize the employer's right to employ labour on terms below the terms of minimum basic wage.

The Court then gave other illustrations and concluded:

We have referred to these illustrations to show how under the impact of the demand of social justice the doctrine of absolute freedom of contract has been regulated.

The Court also drew a striking analogy between the development and growth of industrial law during the last decade which according to it presents:

a close analogy to the development and growth of constitutional law during the same period in some respects. It is well known that article 19 of the Constitution has guaranteed fundamental rights to citizens and at the same time has provided for the regulation of the said fundamental rights subject to the provisions of clauses (2) to (6) of the said article. Where a conflict arises between the citizen's fundamental right to hold property and a restriction sought to be imposed upon that right in the interest of the general public, courts take the precaution of confining their decisions to the points raised before them and not to lay down unduly broad and general propositions. As in the decision of constitutional questions of this kind, so in industrial adjudication, it is always a matter of making a reasonable adjustment between two competing claims. The

<sup>1</sup>(1963) 3 S.C.R. 930, 936.

fundamental right of the individual citizen is guaranteed and its reasonable restriction is permissible in the interest of the general public; so the claims of the interest of the general public have to be weighed and balanced against the claims of the individual citizen in regard to his fundamental right. So too, in the case of industrial adjudication, the claims of the employer based on the freedom of contract have to be adjusted with the claims of industrial employees for social justice. The process of making a reasonable adjustment is not always easy, and so, in reaching conclusions in such a matter, it is essential not to decide more than is necessary. If industrial adjudication purports to lay down broad general principles, it is likely to make its approach in future cases inflexible, and that must always be avoided. In order that industrial adjudication should be completely free from the tyranny of dogmas or the subconscious pressure of pre-conceived notions, it is of the utmost importance that the temptation to lay down broad principles should be avoided. In these matters, there are no absolutes and no formula can be evolved which would invariably give an answer to different problems which may be posed in different cases on different facts.

It will thus be seen that India can legitimately claim with pride that the right to work and the right to secure a living wage which would enable workmen to enjoy life, liberty and happiness in full measure, which have been enshrined in Part IV of the Constitution, have led to the development of industrial jurisprudence in India. Her industrial jurisprudence is another distinguishing feature of Indian democracy.

## 5

## Remedy for Enforcement of Fundamental Rights

I have so far described the broad features of the fundamental rights guaranteed by the Articles of Part III. I now propose to deal with the provisions of the Constitution which secure to the citizens an effective remedy to enforce those rights. In several constitutions fundamental rights are guaranteed, but there is no specific provision made to enable the citizens to enforce those rights.

The Constitution of the U.S.S.R. is an illustration in point. It does contain an elaborate catalogue of fundamental rights, but provides no machinery for the redress of their infringement. It appears that in recent years some of the Soviet jurists have referred to this important problem, particularly in reference to the protection of the economic rights of the individual recognized by the Stalin Constitution of 1936. So far this idea, however, does not appear to have made any appreciable progress. This important lacuna in the scheme of the Soviet Constitution may perhaps be the result of 'the doctrine of dimension of power' which was the foundation of the earlier constitutions. This doctrine stipulates that each organ of the State exercises all powers of governance, whether executive, legislative or judicial. That is why under the Constitution of 1936, the highest executive authority has been invested with the power to determine whether a legislative act or decision is in conformity with the Constitution or not.

In England, on the other hand, the supremacy of Parliament is absolute and no citizen can challenge the validity of any legisla-

tive action on the ground that it infringes his basic human rights. The constitutional position in this matter has been thus stated by Dicey: 'The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and further that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.' As a matter of history, however, it may be recalled that the original position under the English Constitutional Law was somewhat differently stated by earlier jurists. Coke, for instance, relies upon *Benham's case* in which it was stated that 'it appears in our books that in many cases the common law will control Acts of Parliament and sometimes adjudge them to be utterly void; for which an Act of Parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge such Act to be void'.<sup>1</sup> Chief Justice Holt expressed substantially the same view in *City of London v. Wood*.<sup>2</sup> 'It is a very reasonable and true saying,' observed the learned Chief Justice, 'that, if an Act of Parliament should ordain that the same person should be party and Judge . . . it would be a void Act of Parliament.' But now the doctrine of parliamentary sovereignty is so well established that observations of this character impugning the sovereignty of Parliament have relevance only as a part of academic history on this subject.

Though in England Parliament is supreme, it must be observed that public opinion is so vigorous and articulate, and the tradition of democratic sense of values has so much become a part of the English way of life, that it is extremely unlikely, if not altogether impossible, that the English Parliament would ever pass a law which is entirely repugnant to the basic principles of Common Law. In fact, England can legitimately claim that even without a written constitution guaranteeing fundamental rights, basic human rights are enjoyed by English citizens better than many other democratic countries in the world.

The validity of administrative actions is, however, controlled in England by another basic principle of the English Constitution; that is, the Rule of Law. This rule lays down that every one,

<sup>1</sup> 8 Co. Rep. 113b at p. 118a.

<sup>2</sup> (1701) 12 Mod. 669.

whatever his position, is governed by the ordinary rules of law and that every act of an administrative authority is reviewable by an ordinary court of law. Several writs known to English jurisprudence act as healthy instruments for the protection of citizens' rights and as a check on excessive zeal on the part of the administration. The essential idea of this rule of law was thus stated by Lord Atkin in his celebrated judgment in *Liversidge v. Sir John Anderson*:<sup>1</sup>

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

There is, however, one feature of the development of the Welfare State concept adopted by England which has relevance on this point. Lord Denning has, on one occasion, referred to the increasing powers of the executive and pointed out that 'they touch the life of every one of us at innumerable points: and they are an inseparable part of modern society'. As has been observed by an eminent person:

During the last thirty years the tendency has been to surrender back to the executive powers that had been won from them over the centuries. There was a tendency to initiate a new judicial power, to create administrative courts, making the executive, to a large extent, judges in their own case. The sovereignty of Parliament is threatened, all the time we are being called upon to surrender more and more of our rights and privileges to the Government of the day. This continuous erosion was far more dangerous to liberty.<sup>2</sup>

This extreme view is open to the criticism that it idolizes liberty and does not recognize the true significance and importance of public good which may sometimes be inconsistent with individual liberty.

<sup>1</sup>(1942) A.C. 206, n1 p. 244.

<sup>2</sup>Clement Davies (*Hansard*, 23 October, 1950).

The Indian Constitution, however, has chosen to adopt a new line and has made specific provisions which afford appropriate and adequate remedies to the citizen if and when his fundamental rights are infringed either by legislative or by executive acts. Three provisions deserve to be considered in this context. Article 13(1) which occurs in Part III provides that all laws which are inconsistent with or in derogation of the fundamental rights are void to the extent of such inconsistency. This applies to laws which might have been passed before the Constitution came into force. Having made this provision with regard to past laws, as a corollary, Clause (2) of Article 13 provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this clause shall, to the extent of the contravention, be void. It is also significant that Article 13(3) defines 'law' and 'laws in force' in very wide terms, as follows:

- (a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
- (b) 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

Article 12 defines 'the State' as including the Government and Parliament of India and the Government and Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

It will thus be seen that the sweep of Article 13 is very wide. All actions of the authorities included within the definition of the word 'State' under Article 12 are subject to the control prescribed by Article 13. Laws, both past and future, have to be tested in the light of the provisions of Article 13 and if it is shown that any of them are inconsistent with or are in derogation of the fundamental rights, to the extent of the inconsistency they have to be struck down as invalid. Thus, the first step taken by the Constitution to ensure the enforcement of fundamental rights is to make the very comprehensive provision contained in Article 13.

The next Article to consider in this connection is Article 32. This again occurs in Part III and constitutes a fundamental right.

This Article provides the right to constitutional remedies. Under Article 32(1), the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III is guaranteed. Article 32(2) then confers on the Supreme Court the right to issue several writs which may be appropriate in a given case for the enforcement of the rights conferred by Part III. The same right can be conferred on any other court by Parliament, if it so desires. That is Article 32(3). Article 32(4) emphasizes the fact that the right guaranteed by this Article shall not be suspended except as otherwise provided for by the Constitution. This has reference to the emergency provisions, to which I will have occasion to refer later.

Article 32, in one sense, read with Article 13, constitutes the cornerstone of the scheme of the Indian Constitution. It not only renders laws—past and future—invalid, if they contravene the fundamental rights of the citizens otherwise than as contemplated by Clauses (2) to (6) of Article 19, but it gives the citizens a guaranteed fundamental right to move the Supreme Court to have the said Acts struck down. The Supreme Court has observed that the fundamental right to move the Supreme Court can be appropriately described as the cornerstone of the democratic edifice raised by the Constitution. That is why the Court regards itself as the protector and guarantor of fundamental rights. It may be legitimately asserted that the scheme of Articles 13 and 32 adopted by the Indian Constitution to protect the fundamental rights of citizens has no constitutional precedent.<sup>1</sup> It is true that in other Constitutions special provisions are made for determining questions of the constitutional validity of legislative enactment or executive regulation. Article 134 of the Italian Constitution, for instance, expressly creates a constitutional court for deciding disputes regarding the constitutional validity of a law of the State or of a region or of regulations having the force of law. There is, however, no express provision which deals with the enforcement of fundamental rights and confers on the citizens the right to enforce those rights as a fundamental right itself. It is obvious that the declaration of fundamental rights would not adequately serve its purpose unless it is supplemented by a provision which enables the citizens to enforce those rights in a court of law.

<sup>1</sup> As I will point out later, Section 28 of the Kenya Constitution makes a similar provision.

There is yet another provision to which reference must be made to complete my discussion on this topic. Article 226 confers on the High Courts in different States the power to issue appropriate writs; and this power is almost as wide as the power of the Supreme Court under Article 32, except this, that the right to move the High Court by a writ petition under Article 226 is not a fundamental right.

It will thus be seen that in the scheme of fundamental rights, the judicature of India has to play a major role. I do not propose to discuss the system of administration of justice in India at length on this occasion. I will only indicate the broad features of the judicial system which makes the judicature completely independent of the executive. In the constituent States which make up the democratic republic of India, the High Courts are the highest judicial authority and the Supreme Court is the highest Court in the country. The method provided for the appointment of judges is very significant. In regard to the Judges of the High Courts, their appointment is made by the President after consultation with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court concerned. The tenure of the judges and their salary are guaranteed by the Constitution, and a specific provision is made that they cannot be removed from office otherwise than as provided by the Constitution.

Similarly, judges of the Supreme Court are appointed by the President in consultation with the Chief Justice of India and their terms and conditions of service are secured by the provisions of the Constitution itself. Article 121 provides that 'no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided'. It may, therefore, be legitimately claimed that the provisions made by the Constitution for the appointment and continuance in service of the judges of the High Courts and the Supreme Court guarantee to them complete independence from the executive. It is on such a judiciary that the right has been conferred by the Constitution to safeguard the fundamental rights of the citizens.

I have already described the scheme of Article 19 and indicated broadly the nature of the other fundamental rights guaranteed by the relevant provisions of Part III. After the Constitution

was adopted, on innumerable occasions citizens have moved the High Courts or the Supreme Court for challenging the validity of legislative measures or executive acts on the ground that they offend against one or the other of their fundamental rights. The problem posed by such a challenge always raises the question whether the fundamental right of the citizen has been infringed and, if yes, whether the infringement is justified by any of the provisions contained in Clauses (2) to (6) of Article 19.

The task which the judiciary has to discharge in deciding such disputes is always very difficult. A judge has to weigh in the balance the respective merits of the two contentions and has ultimately to decide whether the impugned legislation is valid or not. In the decision of such an issue socio-economic considerations cannot be ruled out, and the felt necessities of the times always become relevant. It is true, a judge must not allow his own personal views to intrude in his judicial decision; but the general concept of socio-economic philosophy prevailing in the country and the ideal set before the Indian community by the provisions of the Indian Constitution, particularly in Part IV which deals with directive principles, cannot be ruled out as irrelevant. Considerations of this wide character have to be borne in mind before a decision is reached as to whether the impugned legislative measure or executive act is valid or not. Any impartial student of constitutional jurisprudence will, I think, concede that by and large courts in India have upheld the rule of law and have assisted Indian democracy in its march onwards to the realization of its ideal of establishing justice—social, economic and political—in the country. The constitutional remedy so clearly provided by Articles 13, 32 and 226 can, therefore, be described as a very distinguishing feature of the Indian Constitution.

## 6

## The Unity of India—Basic Concept of the Constitution

Having described the fundamental rights enshrined in the relevant provisions of the Constitution, it is time we proceeded to inquire whether the Indian Constitution can be described as a federal constitution or not.

Let me begin with the statement made by Dr. Ambedkar on this point. He described the Indian Constitution, in a sense, as 'a Federal Constitution inasmuch as it establishes what may be called a Dual Polity [which] . . . will consist of the Union at the Centre and the States at the periphery each endowed with sovereign powers to be exercised in the field assigned to them respectively by the Constitution'. Yet he took the precaution to add that the Constitution had avoided the 'tight mould of federalism' in which the American Constitution was caught, and could be 'both unitary as well as federal according to the requirements of time and circumstances'.<sup>1</sup>

The scheme of the Constitution is that it makes appropriate provisions for the institution of legislative, executive and judicial machinery in the different States which constitute the Union of India. Three lists are attached to the Seventh Schedule. They contain respectively the topics on which the legislative power of the Union Legislature, the State Legislatures and both Legislatures can be exercised. The last list is the 'Concurrent List', indicating that on the topics enumerated in the said list, both the State Legi-

<sup>1</sup> *Constituent Assembly Debates* (Government of India, VII, 1), 33-4.

slatures and the Central Legislature can operate. In form, the Union of India can, in a superficial sense, be said to be a federation, because the Union Government is a federal government and the constituent units form different units of the federation. But can the Indian Constitution be said to be federal in the technical sense of the term? My answer to this question would be in the negative.

A federal government is 'a form of political and constitutional organization that unites into a single polity a number of diversified groups or component polities so that the personality and individuality of the component parts are largely preserved while creating in the new totality a separate and distinct political and constitutional unit'.<sup>1</sup> Applying this test, it will be difficult to take the view that the Indian Government is a federal government. Prior to the passing of the Constitution, India did not consist of independent units, as was the case in Canada, Australia or the United States. In these latter States the independent units, which were sovereign, decided to come together and form a federation.

The process of forming a federation under such a set of circumstances necessarily involves the federating units parting with a portion of their sovereignty in favour of the federation. That, constitutionally speaking, was not the position in India. Under the British rule India was governed as a unitary state and though certain legislative powers were granted to the Legislatures in the different States, in no sense could they be said to be sovereign or fully autonomous. That is one reason why the Union of India cannot be said to be a federal state in the technical sense.

The Constitution of India has been differently described by different jurists. Wheare holds the view that 'the federal principle has been introduced into its terms to such an extent that it is justifiable to describe it as a quasi-federal constitution'.<sup>2</sup> This expression, however, has not received the approval of all jurists. According to Ivor Jennings, the Indian federation is 'a federation with a strong centralizing tendency'.<sup>3</sup> Indeed, some jurists are inclined to take the view that 'if there is such a thing as a strict,

<sup>1</sup> William S. Livingstone, *Federalism and Constitutional Change* (Oxford University Press, Clarendon Press, Oxford 1956), p. 9.

<sup>2</sup> Wheare, *Federal Government* (Oxford University Press, London 1951), p. 8.

<sup>3</sup> Ivor Jennings, *Some Characteristics of the Indian Constitution* (Oxford University Press, Madras 1953), p. 1.

pure or unqualified federal principle, then the hard fact is that there are no federations and no federal constitutions'.<sup>1</sup>

The Supreme Court has described the Indian Constitution on one occasion as 'a federal structure with a strong bias towards the Centre'.<sup>2</sup> A distinguished constitutional lawyer has observed that the Constitution which was evolved may perhaps be best described as an arrangement arrived at by the representatives of the people for the governance of their country by the grouping of its territories into various regions, by a distribution of legislative and executive powers between the Governments of these regions and the general Government at the Centre and by the creation of institutions and agencies needed for the efficient governance of the country.<sup>3</sup> It may be said that this purports to describe in a general way what the Constitution of India is like, without placing it in any of the recognized categories of constitutions. That only shows the difficulty of assigning the Indian Constitution to any one recognized category.

It would, I think, be relevant at this stage to refer to some provisions of the Indian Constitution which clearly negate the idea that it is a federal constitution. Take Article 3 of the Constitution. This Article empowers Parliament, by law, to:

- (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;
- (b) increase the area of any State;
- (c) diminish the area of any State;
- (d) alter the boundaries of any State;
- (e) alter the name of any State.

The Supreme Court has held that this would empower Parliament even to extinguish the existence of a State, and that clearly shows that the States cannot be regarded as constituting a federal union.

The power conferred by Article 3 is completely destructive of the essence of a federal State, which is supposed to be composed of units with co-ordinate but limited powers. I am not entering

<sup>1</sup> K. H. Bailey, *Summary Report of Proceedings—International Legal Conference* (New Delhi, 1953-54), p. 29.

<sup>2</sup> *State of West Bengal v. Union of India* (1964), 1 S.C.R. 371, 443.

<sup>3</sup> M. C. Setalvad, *The Indian Constitution 1950-65* (University of Bombay, Bombay 1967), pp. 5-6.

into the details of the scheme of Article 3; it is enough for my purpose to mention broadly its effect.

A study of the three lists in the Seventh Schedule to which I have just referred clearly shows that the powers of the Union have been enlarged, particularly in economic matters, and this has been done because the Constitution-makers thought that in the interests of economic unity and well planned economic development of the country, there ought to be centralized control and administration in certain spheres. The inclusion of 'Highways declared by or under law made by Parliament to be national highways' (Entry 23) and 'Inter-State trade and commerce' (Entry 42), in the Union List leads to this inference.

Article 249 of the Constitution empowers Parliament to legislate even in relation to a matter which is included in the State List if the Council of States declares by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution. This again shows that subject to the restrictions imposed by it, Article 249 authorizes Parliament to take up to itself the functions of the State Legislatures. Implementation of any treaty, agreement or convention with any other country or countries or of any decision made at any international conference also falls within the legislative competence of the Centre under Article 253. Articles 355 and 356 are still more significant. They occur in Part XVIII, which deals with Emergency Provisions, and empower the Union Government to take adequate measures to protect the States against external aggression and internal disturbances. I will have occasion to refer to this aspect of the matter later.

Besides, it is significant that the residual power of legislation has been vested in the Union Legislature and not in the State Legislatures. The power of taxation in respect of the major fields of Customs, Excise and taxes on income has been vested in the Union Legislature and not in the State Legislatures; and the residuary power of taxation is also conferred on the Union Legislature, so that the resources of the Union are unlimited. Of course, the Constitution has taken care to make adequate provision for financial assistance to States by way of grants-in-aid. It is thus plain that the material provisions with regard to its financial structure make the Union powerful and leave the States to depend

very largely on the discretion of the Centre. It is well known that the financial resources of the States are inadequate to meet the ever-increasing claims of welfare measures and the Central Government has inevitably to assist them in many ways.

Thus it does appear that the description which Dr. Ambedkar gave about the basic character of the Indian Constitution is apposite. The Indian Constitution could be both unitary as well as federal, according to the requirements of time and circumstances. The Constitution-makers were fully impressed by the need to emphasize the unity of the country when they framed the Constitution and so the structure which they set up, though it partakes of some of the characteristics of a federal structure, cannot be said to be federal in the true sense of the term. Thus the importance of the unity of the country can be said to be one essential basis of the philosophy of the Indian Constitution.

## How does the Constitution Deal with Possible Emergencies?

I now propose to deal with the Emergency Provisions of the Constitution. The Constitution-makers were aware that after the termination of the second World War, the age of cold war had begun and there was constant fear of conflict between the two giant powers of the world: the U.S.S.R. and the United States. Science and technology were also making breathtaking progress and the atomic age had begun. They were, therefore, apprehensive of the fact that an external threat, either of a military or of an ideological character, may have to be faced by India; and so they were anxious to provide for emergency powers which would enable the Union Government to put the whole of the country on a war-footing and enable it to face any possible danger.

The Constitution-makers had, soon after India became free and Pakistan separated from India and became a separate nation, witnessed the orgy of violence which disturbed both countries and they were determined to see that internal commotion or disturbance should not be allowed to overtake the country or any part of it. That is why they thought it was necessary to provide for emergency powers to deal with situations which may arise not merely as a result of an external threat or aggression, but also as a result of internal disturbance. It is as a result of these two paramount considerations that Part XVIII was drafted by the Constitution-makers to deal with Emergency problems.

There are three distinct types of situations which this Part deals with. Article 352(1) provides that if the President is satisfied that a

grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect. This is a Proclamation of Emergency. Under Clause (2) of Article 352 it is provided that this Proclamation can be revoked by a subsequent Proclamation, and shall be laid before each House of Parliament and shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. There is a proviso to Clause (2), which it is not necessary to cite. Clause (3) lays down that the Proclamation of Emergency authorized by Clause (1) may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

Two things are quite clear. A Proclamation of Emergency can be issued either after the emergency has arisen or it may be issued when there is imminent danger thereof. In regard to both these conditions, the satisfaction of the President is decisive. In other words, it is not necessary that the President should wait for the emergency actually to arise before he issues the Proclamation; imminence of the danger of an emergency also authorizes him to act. It must, however, be borne in mind that the imminence of the danger of an emergency must be real imminence and not a delayed or remote imminence.

India today has to face a possible aggression either by Pakistan or by China. On a strict construction of Article 352(3), it would, I think, not be fair to assume that a mere possibility that Pakistan may attack India, or China may, would justify the issuance or the continuance of the Proclamation of Emergency. It is not a mere possibility or even a reasonable possibility that some time in the future an emergency might arise which justifies the issuance or continuance of the Proclamation; it is actual imminence of the danger that justifies it. Since the President has been given wide powers to issue a Proclamation of Emergency under Article 352, the Union Cabinet must scrupulously bear in mind the requirements of the Article and must advise the President to act in such a manner as would be consistent with the spirit and the letter of Clause (3).

Let me now indicate the effects of the issuance of a Proclamation. The question of issuing such a Proclamation is dealt with

in Articles 358 and 359. While a Proclamation of Emergency is in operation, Article 19 is virtually suspended, because Article 358 provides that nothing in Article 19 shall restrict the power of the State to make any law or to take any executive action which the State would but for the provisions contained in Part III be competent to make or to take. There is, however, a safeguard provided by this Article. As a result of this safeguard, any law made by virtue of the existence of the Proclamation shall, to the extent of its repugnance to Article 19, cease to have effect as soon as the Proclamation ceases to operate, except, of course, in respect of things done or omitted to be done before the law so ceases to have effect. This provision indicates that as soon as an emergency is proclaimed, Article 19 ceases to be operative and the fundamental rights guaranteed by it cease to be enforceable by the citizens of India.

This provision presumably proceeds on the assumption that modern wars are fought not merely on the battle fields, but they invade all parts of the territory of the country; bombings and the use of atomic weapons can invade any nook and corner of the country. Besides, as a result of the ideological conflicts on which modern wars are based or are likely to be based in future, the activities of fifth-columnists and saboteurs in the country cannot be overlooked. The safety of the country in modern wars has, therefore, to be ensured not merely against foreign aggression but also from internal subversive activities. That appears to be the ground on which Article 19 is suspended as soon as an emergency is proclaimed.

There is another consequence of the Proclamation of Emergency which is also very important and that is provided by Article 359. Article 359(1) lays down that where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter periods as may be specified in the order. Clause (2) provides that an order so made may extend to the whole or any part of the territory of India, and Clause (3) requires that every order so made shall be placed before each House of Parliament.

It will be recalled that the fundamental rights guaranteed by

Article 19 are virtually suspended merely by the issuance of the Proclamation of Emergency. Not so the other fundamental rights guaranteed by Part III. In regard to this latter category of fundamental rights, if the Union Government desires that their enforcement should also be suspended, the President has to make a specific order in that behalf; and if such an order is made by the President during the pendency of the Proclamation of Emergency, the citizens cease to have the right to enforce their fundamental rights guaranteed by all the Articles in Part III. This, no doubt, is a very serious consequence because, in substance, it brings to an end the rule of law in relation to the exercise by the citizens of their fundamental rights. But this provision again is founded on the same consideration on which is founded the suspension of Article 19 during the operation of the Proclamation of Emergency. Thus, if a Proclamation of Emergency is issued, the two consequences follow as they are indicated in Articles 358 and 359. That is how the Constitution-makers took the precaution of enabling the Union Government to put the nation on a war footing if an emergency either occurs or its threat is imminent.

Let me refer to another consequence which flows from the Proclamation of Emergency. Article 354(1) provides that while the Proclamation of Emergency is in operation, the President may by order direct that all or any of the provisions of articles 268 to 279 shall for such period, not extending in any case beyond the expiration of the financial year in which such a Proclamation ceases to operate, as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit. This order also is required to be laid before each House of Parliament. Articles 268 to 279 relate to the Distribution of Revenues between the Union and the States. They provide a self-contained rational scheme for such distribution. But even this scheme can either be partially suspended or radically altered during the pendency of the emergency. This is a safeguard taken by the Constitution to enable the Union Government to mobilize financial resources for the purpose of prosecuting the war effort which would be needed to meet the emergency in respect of which the Proclamation has been issued. Naturally, such a drastic step would be taken by the Union Government only if the emergency has overtaken the country and there is need to suspend or modify the financial arrangements normally indicated by Articles 268 to 279.

The second category of Proclamations which can be issued by

the President under this Part is dealt with by Articles 355, 356 and 357. While referring to the basic postulates of the Indian Constitution, I have already indicated that the Union Government is intended to be strong and has been given the power to protect the States against external aggression and internal disturbances. In that connection I have mentioned Articles 355 and 356. Article 355 imposes upon the Union the duty to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of the Constitution. Article 356 deals with a situation where the failure of constitutional machinery in any State is reported by its Governor. Clause (1) provides that if the President receives a report from the Governor of a State or otherwise is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution, he may by Proclamation—

- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor, or any body or authority in the State other than the Legislature of the State;
- (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;
- (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State.

There is only one safeguard provided by this Article and that is laid down in the proviso, which says that 'nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts'. This Article, no doubt, confers on the President very wide and drastic powers. The only area which he cannot affect by the exercise of the powers conferred on him by this Article is the area covered by constitutional powers conferred on the High Courts.

The High Court's power to issue writs cannot be affected by such a Proclamation; but with the exception of the High Court and its jurisdiction and powers, the President can, acting under

Article 356, virtually take over the governance of any State. This emphasizes the fact that the Constitution-makers were determined to safeguard the rule of law and the governance of the States in accordance with the provisions of the Constitution. There are three other clauses in Article 356 and provisos thereto, but it is not necessary for my present purpose to refer to them.

Article 357(1) carries the process started by the Proclamation issued under Article 356(1) one step further, and provides that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, and in that connection it makes different provisions. In other words, the legislative machinery of the State can also be virtually suspended and the legislative function performed as laid down by Article 357(1), (a), (b) and (c). This is another category of Proclamation which the President can issue under Part XVIII.

There is yet another type of Proclamation and this the President can issue under Article 360. This relates to a situation of financial emergency. If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect, and in consequence the executive authority of the Union is considerably extended and it is empowered to take suitable action to meet with the financial emergency in question.

It will thus be seen that Part XVIII which deals with Emergency Provisions contains very drastic provisions curtailing the fundamental rights of the citizens in one case and the rights and privileges of the State Legislatures and State Governments in other cases. The object of these provisions clearly is to safeguard the integrity and unity of, and the rule of law in, India and not to allow any emergency to affect them. That, in short, is the nature of the Emergency Provisions made by the Constitution-makers in Part XVIII.

## The Power to Amend the Constitution

Let me now deal with the question about the amendment of the Constitution. The Indian Constitution came into operation on the 26th of January 1950, and up to 1967 Parliament has exercised its power to amend the Constitution under Article 368, 17 times, in consequence of which 21 amendments have been made in the provisions of the Constitution. On the other hand, the American Constitution which was adopted in 1789 has been amended only 12 times so far. It is true that 22 amendments, in fact, have been made; but 10 of these were introduced in bulk soon after the Constitution was passed and were adopted in 1791. Some constitutional lawyers have expressed concern at the manner in which the Indian Parliament has been exercising its power to amend the Constitution, and they feel that the power is exercised by the Indian Parliament somewhat light-heartedly. This criticism does not appear to me to be well founded. I will support my view by taking a few illustrations to show how and why the Indian Parliament thought it necessary to make the several amendments.<sup>1</sup>

Let me take some of the amendments made in 1951. Article 19(1)(a), as we have already seen, guarantees the fundamental right in relation to the freedom of speech and expression, and Article 19(2) had laid down that nothing in relation to the said fundamental right could affect 'the operation of any existing law in so far as it relates to or prevents the State from making any

<sup>1</sup> P. B. Gajendragadkar, *Law, Liberty and Social Justice* (Asia Publishing House, New Delhi, 1965), pp. 88 ff. where this question has been considered in detail.

law relating to libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State'. Thus this Clause set out the cases in which law could be validly framed so as to control and regulate the freedom of speech and expression guaranteed by Article 19(1)(a). This itself was an attempt to synthesize the fundamental right of freedom of speech with the requirements of social harmony and welfare.

Soon after the Constitution was adopted, a problem was raised in the case of *Romesh Thappar v. State of Madras*,<sup>1</sup> in relation to the effect of Article 19(1)(a) read with Article 19(2). The validity of section 9(1-A) of the Madras Maintenance of Public Order Act, 1949, was challenged. The impugned section authorized the State Government 'for the purpose of securing public safety or the maintenance of public order, to prohibit or regulate the entry into or the circulation, sale or distribution in the Province of Madras or any part thereof of any document or class of documents'. The challenge to the validity of the said section was supported on the ground that Article 19(2) could not sustain the relevant provision because under the said section no question about the security of the State arose; what it referred to was public safety or the maintenance of public order and it did not refer to the security of the State.

The Supreme Court upheld the challenge because it took the view that the concept of the security of the State mentioned in Article 19(2) was distinct and separate from the concept of public order. The boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance could not be ignored, said the Supreme Court, and so the impugned law which purported to control the freedom of speech and expression for maintenance of public order could not claim the benefit of Article 19(2).

It would thus be seen that the interpretation put by the Supreme Court on the expression 'security of the State' clearly assumed that even if a speech or writing introduced elements of public disorder it could not be prohibited by any law, and that raised a problem for Parliament. Parliament presumably took the view that when the expression 'security of the State' was used by the Constituent

<sup>1</sup>(1950) A.I.R. S.C. 124.

Assembly in Article 19(2), the Constitution-makers thought that public order would be included within the said words. But since judicial interpretation falsified the said anticipation, occasion arose to make the intention of the Constituent Assembly clear by adding the words 'public order' in Article 19(2). This amendment was passed on the 18th of June 1951. In the result, freedom of speech and expression can now be controlled even for the purpose of safeguarding public order.

While including 'public order' in Article 19(2), Parliament also added some other considerations. Amongst them was one relating to incitement to an offence. In other words, by adding the words 'incitement to an offence' in Article 19(2), Parliament made it clear that the freedom of speech and expression guaranteed by Article 19(1)(a) can be controlled with a view to avoiding its use for the purpose of inciting the commission of an offence. This amendment became necessary as a result of another judicial decision.

*In re Bharathi Press*,<sup>1</sup> the Patna High Court took the view that the decision of the Supreme Court in the case of *Romesh Thappar v. State of Madras* required the Court to hold that the penalty imposed for attempts to incite murder or other cognizable offences was constitutionally invalid inasmuch as such incitement did not undermine the security of the State or tend to overthrow the State. It is true that this decision of the Patna High Court was subsequently reversed by the Supreme Court in *State of Bihar v. Shailabala Devi*.<sup>2</sup> But since Parliament was amending Article 19(2) as a result of the decision of the Supreme Court in Romesh Thappar's case, it took the precaution of making it clear that the requirement of civilized existence was that no one should instigate the commission of offences, and so provided that the freedom of speech and expression can be regulated in order to sustain that requirement.

Let me take another illustration to show how and why the Constitution came to be amended. Article 19(1)(g) guarantees to all citizens the right to practise any profession or carry on any occupation, trade or business. In *Motilal v. State of Uttar Pradesh*,<sup>3</sup> the Allahabad High Court had to consider whether the scheme

<sup>1</sup>(1951) A.I.R. Patna 12, p. 21.

<sup>2</sup>(1952) A.I.R. S.C. 329, p. 330.

<sup>3</sup>(1951) A.I.R. All. 257.

of nationalization of any industry, business or trade such as transport was constitutionally valid. It was argued by the party challenging the nationalization scheme that the said scheme amounted to a monopoly and constituted an infringement of the citizen's fundamental right under Article 19(1)(g). This challenge was upheld by the Allahabad High Court, and Parliament had to consider whether it was necessary to amend the Constitution in order to enable State Legislatures to undertake schemes of nationalization of transport. The Congress Party, which was then in power at the Centre and in the States, attached considerable importance to the scheme of nationalization in certain trades, businesses, industries and services, and when Parliament found that the whole programme of nationalization might have to be given up in view of the decision of the Allahabad High Court, they thought it necessary to amend Article 19(6) accordingly. I have already indicated how Article 19(6), as amended, seeks to justify nationalization on a doctrinaire consideration and draws a presumption that a nationalization scheme to which Article 19(6) applies would *prima facie* be assumed to be for the public good.

Article 31 which deals with the right to property gave rise to numerous conflicts at the instance of property holders who challenged all attempts made by State Legislatures to introduce agrarian reform. In summarizing the present constitutional position under Article 31, I have indicated how that Article came to be amended from time to time. The problem posed by these challenges to the validity of agrarian reform legislations passed by several States was treated by Parliament as of great importance to the pursuit of its economic policies, and while amending Article 31 from time to time, Parliament ultimately took the somewhat unusual and drastic step of validating several Acts already passed and including them in the Ninth Schedule for that purpose. I have already mentioned that the Ninth Schedule includes as many as 64 Acts and these have been retrospectively protected from any challenge on the ground that they violate fundamental rights of property guaranteed by Article 19 or Article 31.

There is yet another class of amendments which became necessary in order to overcome the difficulties created by judicial decisions. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth, whereas Article 29(2) provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State

funds on grounds only of religion, race, caste, language or any of them.

In *Champakam Dorairajan v. State of Madras*,<sup>1</sup> the validity of the Madras Government's Communal Order was challenged. This Order had allowed the State educational institutions to allocate seats in certain proportions according to communities, and the challenge to the validity of the Order proceeded on the ground that the said allocation contravened the constitutional rights guaranteed by Article 15(1) and Article 29(2). The Madras High Court struck down the Order as being unconstitutional and the same view was taken by the Supreme Court in appeal. One of the objects of the impugned Order clearly was to afford preferential treatment and special facilities for the educational advancement of socially and educationally backward classes such as Scheduled Castes and Scheduled Tribes. But it was realized that since Article 15(1) was absolute in terms and provided for no exception whatever, the fundamental object of the Constitution to assist the economic, social and educational progress and development of these backward communities would be frustrated. That is why Parliament amended Article 15 by adding a specific clause, viz. Clause (4), which lays down that nothing in the said Article or Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

I have given these illustrations of the amendments made by Parliament in the several provisions of the Constitution from time to time to emphasize the fact that Parliament proceeded to amend the Constitution only when it found that judicial decisions either inadequately or erroneously interpreted the intention behind the relevant constitutional provisions or they pointed out certain lacunae in them. Let it be recalled that the Constitution-makers had committed the country to the establishment of social and economic justice and they had laid down specifically in Part IV that the Directive Principles, though not justiciable, were of vital significance to the governance of the State. Whenever it was found that the provisions contained in Part III of the Constitution tended to obstruct or prevent the implementation of the Directive Princi-

<sup>1</sup>(1951), A.I.R. Madras, 120.

ples. Parliament thought that it was necessary to make suitable amendments in them.

In one sense, the process by which the Constitution was amended by Parliament from time to time is a shining example of the democratic process itself. In a democratic country governed by a written constitution, the interpretation of the constitution is entrusted to the judiciary. The judiciary also is appointed the sole custodian of the liberties and fundamental rights of the citizens. The independence of the judiciary is guaranteed and its verdict is binding on all the citizens and the State. In this process it is not unlikely that judicial interpretation may on occasion construe the words of the Constitution in a narrow or pedantic way and fail to appreciate the true intention of the Constitution. It is also not unlikely that the Constitution-makers may have used words not sufficiently accurate or expressive or clear to convey their intention. In either case, if Parliament finds that the intention of the Constitution has either been misinterpreted or was inadequately expressed in the Constitution, the process of democracy requires that the words in the Constitution be changed and the original intention carried out.

The process of democracy is really based on the doctrine that you make progress on the strength of reason and test the validity of your steps in the light of experience. If experience shows that words used in the Constitution were inadequate or inappropriate or have been erroneously interpreted, reason requires that amendment should be made in the relevant words and the constitutional process allowed to function in aid of the basic objectives of the Constitution. That, broadly stated, is the reasonable conclusion any student of democracy and of constitutional law would draw from the process of amendments to which I have just referred.

This process, however, raises another interesting issue and that is, whether Parliament has a right to amend the Constitution so as to affect the fundamental rights guaranteed by Part III. In dealing with this question, it is necessary to remember one distinguishing feature of the Indian Constitution. The Constitution adopted by the Constituent Assembly embodies what may be regarded as a characteristic feature of Indian culture, the doctrine of reconciliation. It has been the special trait of Indian culture to make an effort to harmonize and synthesize competing and sometimes conflicting ideas. As Granville Austin has observed:

Indians can accommodate such apparently conflicting principles by seeing them at different levels of value, or, if you will, in compartments not watertight, but sufficiently separate so that a concept can operate freely within its own sphere and not conflict with another operating in a separate sphere. Accommodation is not compromise. Accommodation is a belief or an attitude; compromise is a technique. To compromise is to settle an issue by mutual concession, each party giving up the portion of its desired end that conflicts with the interests of the other parties. It is the search for a mutually agreeable middle way. . . . With accommodation, concepts and viewpoints, although seemingly incompatible, stand intact. They are not whittled away by compromise, but are worked simultaneously. This attitude has been described thus:

... "The most notable characteristic in every field of Indian activity . . . is the constant attempt to reconcile conflicting views or actions, to discover a workable compromise, to avoid seeing the human situation in terms of all black or all white". . . . As India's philosopher Vice-President (now President) Sarvepalli Radhakrishnan has put it: "Why look at things in terms of this or that? Why not try to have both this *and* that?"<sup>1</sup>

The writer is perceptive and has simply confused compromise with accommodation. Another observer agrees that accommodation may "reflect an Indian style of thought, and that it might conceivably be accepted as an Indian tradition of political behaviour".<sup>2</sup>

Austin has further pointed out:

The roots of accommodation rest in the soil of Indian thought . . . thought that is characterized by its lack of dogmatism. What Spear has called the "absorptive and syncretistic features of Hinduism",<sup>3</sup> attributes that could flourish only in an undogmatic atmosphere, have become the basis of the Indian (Indian Muslim as well as Hindu) approach to life. "Religion in India is not

<sup>1</sup> Vera M. Dean, *New Patterns of Democracy* (Oxford University Press, Bombay, 1959), p. 2.

<sup>2</sup> Francis Cornell, 'Political Ideas and Ideologies in South and South-East Asia'. Chapter XIV of S. Rose (ed.), *Politics in Southern Asia* (Macmillan and Co. Ltd., London, 1963), p. 282.

<sup>3</sup> Austin, *op. cit.*, p. 318.

<sup>4</sup> Spear, *India* (University of Michigan Press, Avon Arbor, 1961), p. 39.

dogmatic," wrote Radhakrishnan. "It is a rational synthesis which goes on gathering into itself new conceptions as philosophy progresses. It is experimental and provisions in its nature. . . ." Such an attitude of open examination of all thought makes accommodation possible, for new ideas are not held at arm's-length.<sup>1</sup>

It is in the light of this distinguishing feature of the Indian way of life which is reflected in the drafting of the Indian Constitution, that the problem about Parliament's power to amend the Constitution has to be examined.

The power to amend the Constitution is to be found in Part XX, which consists of only one Article, Article 368. Let me read the whole of the Article:

368. An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

It is clear that this Article deals with the question of amendment

<sup>1</sup> Radhakrishnan, *Indian Philosophy I* (George Allen & Unwin Ltd., London, 1923), pp. 25-26.

<sup>2</sup> Austin, *op. cit.*, pp. 320-21.

of the Constitution in its entirety. It prescribes the procedure for amendment and indicates by necessary implication that any provision in the Constitution can be amended if the procedure prescribed by it is followed. It is unnecessary for my purpose to analyse and explain the difference in procedure prescribed by Article 368 for amending different provisions of the Constitution. It is sufficient to say that the said Article confers on Parliament the power to amend and prescribes the procedure for effecting such an amendment. In terms it provides that when a Bill suggesting an amendment is presented to the President for his assent and receives his assent, 'the Constitution shall stand amended in accordance with the terms of the Bill'.

The question as to whether Article 368 empowers Parliament to amend the Constitution so as to affect the fundamental rights guaranteed by the provisions of Part III of the Constitution has been considered by the Supreme Court on three occasions. In *Sankari Prasad Singh Deo v. Union of India*,<sup>1</sup> the Supreme Court held that the power to amend the Constitution was contained in Article 368 and that the word 'law' in Article 13(2) did not include an amendment of the Constitution which was made in the exercise of constituent and not legislative power. Several amendments made in the Constitution thereafter have been upheld by the Supreme Court following the decision in Sankari Prasad's case. The Seventeenth Amendment was challenged before the Supreme Court on the ground that a law amending the Constitution is a law within the meaning of Article 13(2) and so if the result of the amendment is to affect the fundamental rights, the law to that extent is invalid and the Seventeenth Amendment was accordingly void. In *Sajjan Singh v. State of Rajasthan*,<sup>2</sup> where this point was raised, the majority held that Sankari Prasad's case was rightly decided and found that the position was so clear that it was not necessary to refer the matter to a larger Bench. The minority expressed a doubt as to the correctness of the decision in Sankari Prasad's case. Later, in *Golak Nath v. State of Punjab*,<sup>3</sup> the same question was considered by a Bench of eleven Judges and by a majority of 6:5 it has been held that Article 368 does not confer on Parliament

<sup>1</sup>(1952) S.C.R. 89.

<sup>2</sup>(1963) 1 S.C.R. 933.

<sup>3</sup>(1967) A.I.R. S.C. 1643.

the power to amend the Constitution so as to affect the fundamental rights guaranteed by Part III.

The difference thus disclosed in the decisions of the Supreme Court of India centres round the problem of interpreting Article 368, with a view to determine its scope and effect. This, in turn, mainly depends upon the interpretation of the word 'law' used in Clause (2) of Article 13. The said clause provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this clause shall, to the extent of the contravention, be void. The question is, does the word 'law' used in Article 13(2) include laws made by the Parliament in exercise of the constituent powers conferred on it by Article 368 or does it refer to laws made by the Parliament in exercise of its legislative powers conferred upon it by the relevant provisions in the Constitution and the Schedules? To hold that the word 'law' includes both the types of laws is to adopt a mechanical construction of the said word without regard to the scheme of the Constitution and the very purpose for which Article 368 was enacted. I am free to confess that I do not feel happy that the amendment to the provisions of Part III is not included in the provisions contained in the proviso to Article 368; if it had been so included, any amendment in the provisions contained in Part III, in the terms of the proviso, would have been required 'to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent'. It is, I think, for the Indian Parliament to consider whether it would not be wise to include the provisions of Part III in the proviso to Article 368. However, I do not propose to pursue this matter further in these lectures. My intention is to deal with this problem independently of the relevant decisions of the Supreme Court.

Looking at the question in its broad perspective, it seems to me difficult to assume that the Constitution-makers should have thought that the fundamental rights enshrined in Part III were immutable and unchangeable for all time. The Constitution has guaranteed a democratic form of government and has in unmistakable terms committed the country to the ideal of a Welfare State. It is not easy to imagine that having clearly laid down the Directive Principles of State Policy which were essential for the govern-

ance of the country, the Constitution-makers could have intended that, if in course of time, for the enforcement of the Directive Principles, the fundamental rights required to be modified, it should not be possible for succeeding Parliaments to attempt that task. The inclusion of the Directive Principles in Part IV itself suggests that the Constitution-makers must have anticipated that, in course of time, necessary changes would have to be made in Part III to enable the translation of the Directive Principles into living reality.

Besides, it seems to me illogical to take the view that the makers of the Constitution should have assumed that the provisions they were making in the Constitution were so sacrosanct as to be beyond the scope of any change. Having regard to the principle of consensus which the Constitution-makers wisely adopted, it would not be unreasonable to assume that they realized that the solutions to the problems which they were facing at the time when the Constitution was drafted may prove to be inadequate or unsatisfactory in course of time. The nature of the problems may change and the changed problems may need changes in the Constitution as well. This thought must have been present in the minds of the Constitution-makers when they drafted Article 368. Besides, on principle, just as political freedom and democracy are not an end in themselves but are only a means to the achievement of the end of social welfare and public good, so, in principle, fundamental rights cannot be said to be an end in themselves. That has been clearly laid down by Article 19 itself.

I have already emphasized that Clause (1) of Article 19 read with Clauses (2) to (6) thereof unambiguously points out that the fundamental rights guaranteed by Clause (1) are not absolute; they are liable to be controlled and regulated with a view to achieving the objects mentioned respectively in Clauses (2) to (6). It is in that context that I have emphasized the fact that the basic concept of the Indian Constitution is a synthesis between two competing and conflicting claims. If the fundamental rights guaranteed by Article 19 are therefore not absolute and can obviously be regulated, it is idle to suggest that they should be regarded as so sacrosanct as to be beyond any change at any time in future. Besides, one cannot ignore the possibility that judicial interpretation may, on occasion, be erroneous and it would be unreasonable to suggest that if the erroneous interpretation placed upon some provisions of the Constitution invalidates the legislative regulation of some

fundamental rights, the said invalidation should be perpetuated.

Judicial verdict is, no doubt, final so far as it goes and is binding on all the parties including the Legislature. That is one aspect of the democratic way of life and the rule of law; but the other aspect is that the Legislatures are sovereign in their respective spheres and if they find that judicial interpretation does not correctly represent the true intent of the Legislatures, the Legislatures are entitled to amend the law so as to give effect to their true intention. This process does not involve disrespect for the judiciary in any sense; it is a part of the democratic way of life.

Nehru was conscious of the fact that Parliament may have, on occasion, to amend the Constitution; that is why he dealt with the role of the Supreme Court and the High Courts in regard to the interpretation of the fundamental rights and uttered a note of caution that the Supreme Court and the High Courts were not intended to function as Super Legislatures. This is what Nehru said:

No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there, it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of Parliament . . . it is obvious that no court, no system of judiciary can function in the nature of a third House, as a kind of Third House of correction. So, it is important that with this limitation the judiciary should function . . . ultimately the fact remains that the legislature must be supreme and must not be interfered with by the courts of law in such measures of social reform. Otherwise, you will have strange procedures adopted. Of course, one is the method of changing the Constitution. The other is that which we have seen in great countries across the seas; that the executive, which is the appointing authority of the judiciary, begins to appoint judges of its own liking for getting decisions in its own favour, but that is not a very good method.<sup>1</sup>

<sup>1</sup> *Constituent Assembly Debates*, Vol. IX (Government of India, New Delhi), pp. 195-96.

It will be noticed that Nehru, in his characteristically dignified and polite manner, has referred to what happened in the United States when President Roosevelt found that the Supreme Court by its judgments was obstructing the pursuit of the economic policies of his Government. President Roosevelt openly declared that if the Supreme Court continued to obstruct the implementation of the New Deal which his Government had sponsored, it would be necessary to 'pack the Court'; but in order to avoid any misunderstanding about what he intended to do, he explained his idea in very picturesque words. This is what he said:

... We want a Supreme Court which will do justice under the Constitution—out over it. In our Courts we want a government of laws and not of men. I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written, that will refuse to amend the Constitution by an arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean the judiciary is so independent that it can deny the existence of facts universally recognized. ... Those opposing this plan have sought to arouse prejudice and fear by crying that I am seeking to 'pack' the Supreme Court and that a baneful precedent will be established. What do they mean by the words 'packing the Court'? Let me answer this question with a bluntness that will end all *honest* misunderstanding of my purposes.

If by that phrase it is charged that I wish to place on the Bench spineless puppets who would disregard the law and would decide specific cases as I wish them to decide, I make this answer: that no President fit for his office would appoint, and no Senate of honourable men fit for their office would confirm, that kind of appointees to the Supreme Court. But if by that phrase the charge is made that I would appoint and the Senate would confirm Justices worthy to sit beside present members of the Court who understand those modern conditions, that I will appoint Justices who will not undertake to override the judgment of Congress on legislative policy—that I will appoint Justices who will act as Justices and not as legislators—if the appointment of such Justices can be called 'packing the Court' then I say that I, and with me the vast majority of

the American people, favour doing just that thing—now!'

If it is held that the Constitution-makers intended that succeeding generations should not be able to make any amendments in the constitutional provisions as to fundamental rights and with that object in mind prevented all future Parliaments from undertaking that task, a very anomalous consequence would follow. If there is no democratic way of amending the Constitution open to a country, and a succeeding generation feels that some amendment is essential in the interests of the public good, what is the course that the country can adopt? The only course that the country can then adopt is to go through the pangs of a bloody revolution and to scrap the Constitution altogether. It may sound paradoxical but nevertheless it is true that the power to amend the Constitution ultimately provides for its stability and a steady progress of the nation in accordance with the rule of law. This idea was so aptly expressed by Nehru when he observed:

A constitution which is unchanging and static—it does not matter how good it is, how perfect it is—is a constitution that has outlived its use. It is in its old age already and gradually approaching its death. A constitution to be living must be growing, must be adaptable, must be flexible, must be changeable.<sup>2</sup>

That is the position which prevails in regard to most of the written constitutions in democratic countries. Written constitutions generally provide for their own amendment. Take for instance the Constitution of the United States and the Australian Constitution. Under both these Constitutions the Federal Government is vested with enumerated powers and the residuary powers are vested in the States. The express legislative powers which are vested in the U.S. Congress and the Commonwealth Parliament in Australia do not contain any power to amend the Constitution. The U.S. Constitution does not expressly confer on Congress the power to amend

<sup>1</sup> From the broadcast address of President Roosevelt delivered on 9 March 1937; for the whole address see Jackson, *The Struggle for Judicial Supremacy*, p. 340 et seq. Quoted by H. M. Seervai, *Constitutional Law of India* (N. M. Tripathi Ltd., Bombay, 1967), pp. 1088-9.

<sup>2</sup> Speech in the House of the People, 29 May 1951, *Jawaharlal Nehru's Speeches, 1949-53*, p. 525. Quoted by Donald Eugene Smith, *Nehru and Democracy* (Orient Longmans, Calcutta, 1958), p. 177.

the Constitution, but it sets up a procedure for amendment, and this procedure shows beyond doubt that the power to amend is implied from the said procedure itself. In regard to the Australian Constitution, Chapter VIII is described as 'Alteration of the Constitution'. It consists of one section — section 128, and its marginal note is: 'Mode of altering the Constitution'. This section opens with the words: 'This Constitution shall not be altered except in the following manner'. Thus, there is no express power conferred on the Commonwealth Parliament to amend the Constitution, but the power is clearly implied in section 128. I have, therefore, no doubt that Article 368 confers power on Parliament to amend the Constitution, including the provisions contained in Part III, subject of course to the procedure and limitations prescribed by the other provisions of the said Article.

Having thus broadly considered the philosophy of the Indian Constitution and its basic postulates, I feel tempted to observe that on the whole the Constitution-makers made an earnest endeavour to translate Gandhiji's dream about the future of India into actual provisions of Constitutional Law.



## 9

# Kenya and India—Common Philosophy of National Life

## THE STORY OF KENYA'S INDEPENDENCE—SOME SALIENT FEATURES

The story of independent Kenya began on the 1st of June 1963, when she attained Internal Self-Government. Mzee Jomo Kenyatta, who was the Prime Minister of internally self-governing Kenya, took oath as Prime Minister on that date and made his historic pronouncement outside the Prime Minister's office in Nairobi. In this speech he gave Kenya her national motto and rallying-cry: 'All pull together . . . *HARAMBEE!*'. Said the Prime Minister:

This is one of the happiest moments of my life. We are now embarking on the final brief stage which will lead this country to Independence. It is not a celebration by one Party as its election victory. Rather must it be a rejoicing of all the people of this land at the progress towards the goal of Independence. But as we celebrate . . . let us remember that constitutional advance is not the greatest end in itself. Many of our people suffer in sickness. Many are poor beyond endurance. Too many live out narrow lives beneath a burden of ignorance. As we participate in pomp and circumstance, and as we make merry at this time, remember this: we are relaxing before the toil that is to come. We must work harder to fight our enemies—ignorance, sickness and poverty. I therefore give you the call: *HARAMBEE!* Let us all work hard together for our country, Kenya.<sup>1</sup>

<sup>1</sup> Jomo Kenyatta, *Harambee! The Prime Minister of Kenya's Speeches 1963-1964* (Oxford University Press, Nairobi, 1964), p. 7.

The next inevitable step in Kenya's memorable journey to her destined day of political independence arrived on the 12th of December 1963. It was celebrated as the Uhuru Day. A crowded week full of pageant and ceremony, in which all citizens of Kenya danced with joy and excitement, brought Kenya the realization of her dream. She became free. Beneath the symbols of independence, of course, did lie the more solemn and inspiring trappings of history. Mzee Jomo Kenyatta, the architect of Kenya's freedom, had now attained the status of father-figure. He naturally held the centre of the scene. On this never-to-be-forgotten occasion, the Constitutional Instruments issued by the British Government were received by Mzee Jomo Kenyatta in recognition of the fact that Kenya had regained her sovereignty and become a proud independent nation with a place of her own in the comity of independent nations of the world.

It is with great pride and pleasure that I receive these Constitutional Instruments today as the embodiment of Kenya's freedom. This is the greatest day in Kenya's history, and the happiest day of my life. Our march to freedom has been long and difficult. There have been times of despair, when only the burning conviction of the rightness of our cause has sustained us. Today, the tragedies and misunderstandings of the past are behind us. Today, we start on the great adventure of building the Kenya nation.<sup>1</sup>

The prophet in Kenyatta and the dedicated servant of the down-trodden and the poor, however, added a word of caution and admonition to his countrymen. 'Today,' said Kenyatta's victorious voice, 'is rightly a day of great rejoicing. But it must also be a day of dedication. Freedom is a right, and without it the dignity of man is violated. But freedom by itself is not enough. At home, we have a duty to ensure that all our citizens are delivered from the afflictions of poverty, ignorance and disease; otherwise freedom for many of our people will be neither complete nor meaningful. We shall count as our friends, and welcome as fellow-citizens, every man, woman and child in Kenya—regardless of race, tribe, colour or creed—who is ready to help us in this great task of advancing the social well-being of all our people.'<sup>2</sup>

<sup>1</sup>ibid, p. 15.

<sup>2</sup>ibid, p. 16.

Here was the voice of the true prophet of Kenya—tolerant, secular, progressive—his eyes fixed on the future when Kenya will attain the full stature of her personality. Later, on the 20th of October 1964, which was celebrated throughout Kenya as Kenyatta Day, Kenyatta's voice proclaimed the faith of Kenya in these inspiring words:

All the noble Charters and Declarations of history, and all the Constitutions that enshrine human rights, have sprung from one paramount truth; that men in their spirit and in their striving, under the law, have the right to be free. The world in these past years has moved rapidly forward, from the Colonial age. Peoples in many continents have been freed, and not just from political bondage. Their talents and their ambitions and their cultures have all been released. Their productive energies have altered the old pattern of economic privilege. Their philosophies have made impact on the thinking of mankind, bringing fresh hope to the cause of world peace.<sup>1</sup>

Between the day that Kenya attained internal self-government and the day that she became free, many political and constitutional events took place in rapid succession. Before independence, the major political parties, KANU and KADU, were divided over the basic issue of a political constitution for Kenya. KANU advocated the establishment of a strong central government, whereas KADU preferred the establishment of autonomous regions in which should be vested wide executive and legislative powers.

Kenya's Constitution which came into force on the 12th of December 1963, was appended as Schedule 2 to the Kenya Independence Order in Council, 1963. This Constitution is a unique document of its kind, long and complex, and it made extraordinary provisions safeguarding the rights of the regions and providing for ample protection against the amendment of any of its entrenched provisions.

After the Constitution came into force, it looked as if the supporters of regionalism (or 'Majimbo' as it was called) had succeeded. Section 71 of the Constitution required that for the amendment of any provision, the Bill introduced for that purpose had to be supported by 75 per cent of all the members of each of the two Houses of the National Assembly, i.e., of the elected

<sup>1</sup>ibid, pp. 1-2.

House of Representatives and of the elected Senate. Failing that, a referendum was permissible, and it was provided that two-thirds of all the citizens of Kenya casting their votes should support the amendment. Some provisions of the Constitution which had relevance to the regions were described as 'specially entrenched' and they could only be amended if the amendment was supported by 75 per cent of all the members of the Lower House and by 90 per cent of the Upper House, the alternative of a referendum not being available in this case. Thus any change in the entrenched or specially entrenched provisions of the Constitution which the KANU Party might have desired in order to translate into reality their political faith in the propriety, wisdom and necessity of a strong central government looked very difficult to achieve.

However, after the Constitution had come into force and Kenya had begun to function as an independent country, in the early part of 1964 it was found by experience that the regions did not come up to the expectations of the public, and the administrative weakness from which the governance of the regions suffered became unpopular. On the other hand, the Central Government proved its mettle by its strength and its vitality. This state of affairs naturally raised the demand for the abolition of regionalism and that was the opportunity for the KANU Party.

On the 17th of August 1963, Prime Minister Mzee Jomo Kenyatta had stated in the House of Representatives that his Government wanted to introduce a republican constitution on the first anniversary of independence and to amend the Constitution to restore a unitary State. This statement was generally welcomed, but the KADU minority did not approve of it. It was plain that the KANU Government did not have the necessary 75 per cent majority in the House of Representatives, nor 90 per cent majority in the Senate.

Under the able leadership of Prime Minister Mzee Jomo Kenyatta, the Government began to think of some constitutional devices to achieve their main objective. They, therefore, introduced a Bill which ultimately became the Constitution of Kenya (Amendment) Act, 1964. This Bill sought to make certain amendments in the structure of the Government without touching the specially entrenched provisions. This precaution was taken because the KANU Party was conscious that it would not be able to obtain the constitutionally provided majority in the Legislature in support of the Bill, and so it kept in view the necessity to adopt the alternative

method of submitting the Bill to referendum. The Bill sought to establish a republican form of government and thereby take away almost all the powers of the regions. A substantial part of the revenues of the regions was also withdrawn to the Centre.

Significantly enough, during the passage of this Bill through the Lower House, the KADU Party, which was then the Opposition Party, crossed the Floor of the House and joined with KANU to form a national government. The inevitable consequence was that the Bill was passed and was soon followed by the enactment of another Constitutional Amendment Act, viz., the Constitution of Kenya (Amendment) (No. 2) Act, 1964. This Act made the necessary consequential amendments to the specially entrenched provisions of the Constitution. The result was that Kenya became a Unitary State on Republic Day, and the regions have merely survived as a tier of local government. They depend for their powers on delegation by Parliament. In consequence, Prime Minister Kenyatta became the President of the Republic of Kenya. In substance, the offices of the Governor-General and the Prime Minister were thus rolled into one and its proud occupant was inevitably Kenyatta, who had attained the exalted status of the father-figure of Kenya.

#### SOME IMPORTANT FEATURES OF THE CONSTITUTION OF KENYA

I will now refer very broadly to some of the provisions of the Constitution of Kenya which supply the background of the philosophy of Kenya's national life and its basic postulates.

As I have just indicated, the Constitution of Kenya is Schedule 2 of the Kenya Independence Order in Council, 1963. Section 3 of this Order (now repealed) provided that, subject to the provisions of this Order, the Constitution of Kenya set out in Schedule 2 of the Order should come into effect in Kenya at the Commencement of this Order; and this Order came into force on the 12th of December 1963. The Constitution of Kenya originally contained 15 Chapters and now has 13, and it has as many as 247 sections. There were originally 11 Schedules to this Constitution, and now there are 7. Chapter II deals with the protection of fundamental rights and freedoms of the individual. It consists of sections 14 to 30. Section 14 provides that each individual is entitled to the fundamental rights of:

- (a) life, liberty, security of the person and protection of the law;

- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation.

This provision is founded on the basic concept of Kenya's political philosophy that every person is entitled to enjoy these rights 'whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex'. Section 14, however, lays down that these fundamental rights are subject to such limitations as are contained in Chapter II, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. This doctrine bears remarkable resemblance to the doctrine of the Indian Constitution which seeks to establish a rational synthesis between fundamental rights and the public interest or the public good.

Section 15 deals with the protection of right to life, and it lays down that no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted. Sub-section (2) of section 15 provides certain exceptions to sub-section (1).

Section 16 provides for the protection of the right to personal liberty. Section 16(1) lays down that 'No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases', and these cases are prescribed by clauses (a) to (j) of that sub-section. It is remarkable that clause (f) which provides an exception to the protection of right to personal liberty, deals with the case of a person who has not attained the age of 18 years, for the purpose of his education or welfare. In other words, this clause proclaims the faith of Kenya in the necessity of educating and looking after the welfare of young persons and provides that if a young person below the age of 18 is deprived of his liberty for the purpose of his education or welfare, he cannot claim the protection of section 16(1). Sub-section (2) provides that if a person is arrested or detained, he shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention; and sub-sections (3), (4), (5) and (6) deal with the proceedings that follow after the arrest of a person. Sub-section (6) is very eloquent. It provides that any person who

is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person.

Section 17 affords protection from slavery and forced labour. Section 18 affords protection against inhuman treatment. Section 19 deals with the protection of property and saves persons from deprivation of property except in the manner provided by its relevant clauses. This section has some resemblance to Article 31 of the Indian Constitution. Sub-section (2) of section 19 provides for a remedy to a party who feels aggrieved by the action taken against his property contrary to section 19(1). This remedy consists of an application to the High Court for determination of the relevant issues. Sub-section (6) provides for exceptions to the protection granted by sub-section (1). Sub-section (7) virtually makes the provisions of sub-section (1) inapplicable to any interest in or right over property where that property, interest or right is vested in a body corporate, established by law for public purposes in which no moneys have been invested other than moneys provided by Parliament. It must, however be emphasized that in two material particulars, Section 19 differs from Article 31. Section 19 specifies the objects for which property can be acquired and it empowers the High Court to direct prompt payment of adequate compensation.

Section 20 provides for protection against arbitrary search or entry. Section 21 contains provisions to secure protection of law. Section 22 protects freedom of conscience. Sub-section (2) of section 22, which is very secular in its spirit, provides that every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage any place of education which it wholly maintains; and no such community shall be prevented from providing religious instruction for persons of that community in the course of any education provided at any place of education which it wholly maintains or in the course of any education which it otherwise provides. Sub-section (5) of section 22 provides for exceptions to the freedom guaranteed by sub-section (1).

Section 23 deals with the freedom of expression. Section 24 affords protection for freedom of assembly and association. Section 25 affords protection for freedom of movement. Sub-section (3) deals with cases where freedom of movement can be validly regulated or controlled. The provisions of this section are somewhat similar to the provisions of Article 19(1) (d) and (e) of the Indian

Constitution, but it differs from the Indian Article 16 in as much as it expressly guarantees the right to go out of, and come back into the country. This indeed is a very valuable right.

Protection from discrimination on the grounds of race etc. is guaranteed by sub-section (1) of section 26. Sub-sections (4), (5) and (8) provide for exceptions to this rule. It is not necessary to refer to the details of these sub-sections.

Prior to its amendment Section 27 allowed derogation from fundamental rights and freedom. During any period when Kenya is at war or when a declaration of emergency under section 29 is in force, measures that are reasonably justifiable for dealing with the situation that exists in Kenya during that period can be taken. The amended Section provides for two exceptions; war and anything contained or done under the authority of any provision of Part III of the Preservation of Public Security Act or any of the Provisions of that part of that Act.

Section 28, which corresponds to Article 32 of the Indian Constitution, provides for the enforcement of protective provisions.

Section 29 as amended empowers the President to bring into operation 'generally or in any part of Kenya, Part III of the Preservation of Public Security Act or any of the provisions of that power of that Act'. Clauses 2 to 6 provide for safeguards against the arbitrary exercise of the said power.

Section 30 is an Interpretation and Savings Clause.

I do not propose to discuss in detail the several provisions contained in Chapter II. It would, I think, be enough if I make a general statement that in their scope and their object, the provisions of these sections are substantially similar to the corresponding provisions of the Indian Constitution and they are undoubtedly founded on the same philosophy and basic postulates.

Section 71 deals with the problem of the amendment of the Constitution. I have already referred to the fact that as a result of the difficulty created by the relevant provisions of this section, the KANU Party had to use its constitutional ingenuity to make suitable amendments in the Constitution with the object of achieving its goal of a strong unitary form of government for Kenya.

There is another feature of the Constitution of Kenya to which it is necessary to refer, and that relates to the appointment of the members of the judiciary in Kenya. The independence of the judiciary has been safeguarded by the relevant provisions of the Constitution of Kenya in Chapter X which deals with the Judi-

cature. The tenure of the judges of the High Court and their terms and conditions of service are constitutionally guaranteed.

There is one provision which strikes me as an improvement in many ways on the prevailing position in England or even in India. Section 184 which deals with the Judicial Service Commission provides for the composition of the Commission, which shall consist of the Chief Justice as the Chairman, the Attorney-General, two persons who are for the time being designated in that behalf by the President, acting in accordance with the advice of the Chief Justice, from among the Justices of Appeal or the Puisne Judges of the High Court, and one person who is for the time being designated in that behalf by the President, acting in accordance with the advice of the Chairman of the Public Service Commission, from among the members of that Commission.

Sub-section (2) of section 184 provides that in the exercise of its functions under the Constitution, the Commission shall not be subject to the direction or control of any other person or authority. Section 185 provides that the power to appoint persons to hold or act in any offices to which that section applies, the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Judicial Service Commission.

The high-powered commission set up by sections 184 and 185 seems to me to be a very attractive feature of the Constitution of Kenya. The significant role which this Commission is expected to play in the judicial life of Kenya would be apparent if I refer to the fact that section 172(2) provides that the Puisne Judges of the High Court shall be appointed by the President, acting in accordance with the advice of the Judicial Service Commission. In view of the spirit of the amendment made by the Constitution of Kenya (Amendment) Act, 1965, it is to be hoped that a convention may be established whereby even the Chief Justice should be appointed by the President in accordance with the advice of the Judicial Service Commission. In other words, it is a remarkable tribute to the wisdom of the makers of the Kenyan Constitution that they have left the appointment of the members of the judiciary in Kenya to the independent body of the Judicial Service Commission, and neither the President nor the Executive Government can have any voice in that behalf.

In India, as a matter of convention and practice, the appointments of the judges of the High Courts are made by the Union

Government on the advice of the Chief Justices of the High Courts as well as the Chief Justice of India, and the appointments of the Puisne Judges of the Supreme Court are made, again as a matter of convention, always on the advice of the Chief Justice of India. The relevant constitutional provisions in the Constitution of India require consultation with the Chief Justices of the High Courts and the Chief Justice of India, and in practice consultation has always meant concurrence and no appointment is made without the concurrence of the Chief Justice of India.

The Constitution of Kenya, however, has with the exception of the appointment of the Chief Justice of the High Court not left this matter to any convention or practice and has not even left it to the unfettered discretion of the Chief Justice of the High Court. The onerous and difficult task of choosing members of the judiciary has been entrusted to a high-powered judicial commission and its composition has been so prescribed as to secure complete impartiality and objectivity in the selection of proper personnel for the judiciary. I wish to pay my tribute to the makers of Kenya's constitution for this enlightened, progressive and significant provision that they have made in the relevant part of the Constitution.

#### AFRICAN SOCIALISM—ITS BROAD PERSPECTIVE

Like India, Kenya is committed to the concept of a Welfare State. As President Kenyatta himself has eloquently expressed on several occasions, political freedom is not an end in itself; it is a means, and the validity and the value of this means would be judged by the results it achieves in bettering the lot and improving the lives of the common men and women of Kenya. This ideal, in substance, can be described as the ideal of democratic socialism, that is to say, the ideal to translate welfare concepts and adopt socialism by the rule of law in a democratic way. This problem has been considered by African politicians and political thinkers and there is a remarkable amount of consensus in their viewpoints and their approach. Let me quote a few illustrations in support of my statement.

President Kenyatta expressed his philosophy by observing:

... we declared that our country would develop on the basis of the concepts and philosophy of Democratic African Socialism. We rejected both Western Capitalism and Eastern Communism

and chose for ourselves a policy of positive non-alignment.<sup>1</sup> Sekou Toure has thus expressed his views:

Our unceasing efforts will be directed towards finding our own ways of development, if we wish our evolution and our emancipation to take place without our personality being thereby altered. Every time we adopt a solution authentically African in its nature and conception, we shall solve our problems easily, because all those who take part in it will be neither disorientated nor surprised by what they have to achieve; they will realize without difficulty the fashion in which they must work, act or think. Our specific qualities will be used to the full, and in the last analysis we shall accelerate our historical evolution.<sup>2</sup>

According to Julius Nyerere, *Ujamaa* or 'Familyhood' describes African socialism. It is opposed to capitalism, which seeks to build a happy society on the basis of the exploitation of man by man; and it is equally opposed to doctrinaire socialism, which seeks to build its happy society on a philosophy of inevitable conflict between man and man.<sup>3</sup> Tom Mboya, in his *African Socialism* says:

Let us go abroad to ask for loans and technical skills, not for ideals and ideologies. We must come forward ready to build from our own resources, energy and sweat the Africa of our own vision and dreams, and not the blueprints of the West or the East.<sup>4</sup>

It is thus clear that African socialism refuses to succumb to the concept of 'political neo-colonialism', which attempts to force the newly liberated countries to choose between capitalism and communism and thereby seeks to re-establish colonial domination in another form, viz., ideological domination. It appears that most of the African leaders do not adopt a doctrinaire approach in dealing with the problem of socialism in their respective countries. They are committed to economic development, to the welfare of the common men and women, to raise their living

<sup>1</sup> Ralph Milliband and John Saville (ed.), *The Socialist Register 1966* (The Merlin Press, London, 1966), p. 229.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, pp. 228-29.

standards; but they choose to adopt an approach which is flexible, empirical and pragmatic.

The Kenya White Paper sums up the position with the observation that 'African Socialism as a system can profit from the mistakes of others. Unlike many countries that have eliminated many successful economic mechanisms on narrow ideological grounds, Kenya is free to pick and choose those methods that have been proven in practice and are adaptable to Kenya conditions regardless of the ideologies that others may attach to them'.<sup>1</sup>

This concept of pragmatic socialism which believes in democracy and the rule of law has been concretely and precisely defined by the Government of Kenya in its official publication *African Socialism and its Application to Planning in Kenya* (1965). Let me summarize the basic concepts of this philosophy in the words of the publication itself.

In the phrase 'African Socialism', the word 'African' is not introduced to describe a continent to which a foreign ideology is to be transplanted. It is meant to convey the African roots of a system that is itself African in its characteristics. African Socialism is a term describing an African political and economic system that is positively African, not being imported from any country or being a blueprint of any foreign ideology but capable of incorporating useful and compatible techniques from whatever source. The principal conditions the system must satisfy are—

- (i) it must draw on the best of African traditions;
- (ii) it must be adaptable to new and rapidly changing circumstances; and
- (iii) it must not rest for its success on a satellite relationship with any other country or group of countries.<sup>2</sup>

According to the Kenyan concept,

There are two African traditions which form an essential basis for African Socialism—political democracy and mutual social responsibility. Political democracy implies that each member of society is equal in his political rights and that no individual or group will be permitted to exert undue influence on the

<sup>1</sup> *African Socialism and its Application to Planning in Kenya* (Government of Kenya, Government Printer, Nairobi 1965), p. 8.

<sup>2</sup> *Ibid.*, pp. 2-3.

policies of the State. The State, therefore, can never become the tool of special interests, catering to the desires of a minority at the expense of the needs of the majority. The State will represent all of the people and will do so impartially and without prejudice.<sup>1</sup>

What is 'political democracy' according to this concept?—

Political democracy in the African traditional sense provided a genuine hedge against the exercise of disproportionate political power by economic power groups. In African society a man was born politically free and equal and his voice and counsel were heard and respected regardless of the economic wealth he possessed. Even where traditional leaders appeared to have greater wealth and hold disproportionate political influence over their tribal or clan community, there were traditional checks and balances including sanctions against any possible abuse of such power. In fact traditional leaders were regarded as trustees whose influence was circumscribed both in customary law and religion.<sup>2</sup>

Mutual social responsibility which plays an important role in the development of socialism according to the African concept.

is an extension of the African family spirit to the nation as a whole, with the hope that ultimately the same spirit can be extended to ever larger areas. It implies a mutual responsibility by society and its members to do their very best for each other with the full knowledge and understanding that, if society prospers, its members will share in that prosperity and that society cannot prosper without the full co-operation of its members. The State has an obligation to ensure equal opportunities to all its citizens, eliminate exploitation and discrimination, and provide needed social services such as education, medical care and social security.<sup>3</sup>

The vexed problem of nationalization has been thus tackled by the Kenyan Government:

Nationalization is a useful tool that has already been used in Kenya and will be used again when circumstances require. The

<sup>1</sup> *ibid.*, p. 3.

<sup>2</sup> *ibid.*

<sup>3</sup> *ibid.*, p. 4.

pertinent questions are at what cost, for what purpose, and when. The Constitution and the KANU Manifesto make it clear that African Socialism in Kenya does not imply a commitment to indiscriminate nationalization. These documents do commit the Government to prompt payment of full compensation whenever nationalization is used. Kenya's policy with respect to nationalization should be more clearly defined within these stipulations.<sup>1</sup>

Would Kenya adopt nationalization? The answer given is clear and precise:

Nationalization, then, will be considered if the need is urgent, if other less costly controls are ineffective, and if it is understood that most industries nationalized will not be operated at a loss. Nationalization would also be desirable regardless of cost where a service is vital to the people and must be provided by Government as part of its responsibility to the nation.<sup>2</sup>

That, in brief, is the broad outline of socialism which Kenya hopes to attain democratically under the rule of law and thereby redeem the promise which President Kenyatta made to his countrymen on the occasion of Kenya's independence.

#### KENYA AND INDIA—COMMON PHILOSOPHY OF NATIONAL LIFE

I have so far attempted to describe the philosophy of the Indian Constitution and its basic postulates, and have also given a bird's eye view of the philosophy and basic postulates of the Constitution of Kenya. I now propose to describe how Kenya and India seem to share the same political philosophy and seem dedicated to the task of attaining democratic socialism by the rule of law in a democratic way.

*In this connection, I ought to make it clear that my discussion on this topic, in so far as it relates to Kenya, is based solely on the provisions of the Constitution. I have not had an opportunity to study the working of the Constitution and to see how far its provisions are enforced by citizens in courts of law. Fundamental rights guaranteed to the citizens and the independence of the judiciary prescribed by the Constitution can become realities of life*

<sup>1</sup>ibid., p. 26.

<sup>2</sup>ibid., p. 27.

only if citizens boldly challenge contraventions of their fundamental rights, the legal fraternity fearlessly takes their causes to the courts and the courts equally fearlessly examine the question and strike down, when necessary, unjustified violations of fundamental rights. That is an aspect of the matter on which I am not competent to pronounce any opinion. All I can and wish to say is that unless the fundamental rights and the independence of the judiciary become realities in actual life, provisions of the Constitution would be no more than merely pious platitudes.

Both countries are committed to democracy. They have guaranteed fundamental rights to their citizens and have recognized that in a Welfare State no fundamental right, however cherished it may be, can be absolute. Democracy, no doubt, recognizes the validity of fundamental rights. Indeed, it is its proud claim that every citizen is entitled to enjoy life, liberty and happiness in the best way he likes. The development of a citizen's personality is his own concern and neither the State nor the community should interfere with it. But in a Welfare State the claim of the public good naturally holds paramountcy. In the words of Beveridge which have become a classic, democracies have to fight five giant evils. They are: Want, Disease, Ignorance, Squalor and Idleness.<sup>1</sup> Democracies can no longer play a static role and be content to keep law and order within their borders and protect their independence from foreign aggression. That is a policeman's role which is clearly inadequate in the light of the concept of a Welfare State. Democracies, therefore, lean on law as a mighty ally to assist the process of socio-economic justice. In this process, if there is a conflict between individual rights and liberties on the one hand and good of the community or the public on the other, individual rights must yield. That is the basic postulate of the democracy in Kenya as envisaged by its constitution read in the light of the White Paper on African Socialism; as much as of the democracy in India.

The Constitution of Kenya in terms guarantees religious freedom to all sections of the Kenyan community and prohibits discrimination on the ground of religion just as much as the Constitution of India does. Both democracies are thus fundamentally secular in outlook and character and neither of them is a theocratic State. Both countries recognize that the vexed, complicated and complex

<sup>1</sup> Sir William Beveridge, *Social Insurance and Allied Services* (Published by H.M.S.O., London, 1942), p. 170.

socio-economic problems which they have to solve, need an intellectual debate and dialogue and in this debate and dialogue religion or tribalism is wholly irrelevant. The social tensions created by religions or caste-loyalties in India like the social tensions created by tribal or racial loyalties in Kenya, can be effectively resolved by the adoption of the doctrine of secularism both in theory and practice. Thus secularism is another distinguishing feature which is common to the philosophies of the national life adopted in both the countries.

Both countries are facing the problem of evolving a progressive modern society and both are making an attempt to preserve the best of the old national traditions and to discard from the said traditions whatever is unsuitable, whatever is irrational and whatever is inconsistent with the attainment of a Welfare State. 'A nation,' said Sir Arthur Bryant, 'is the product of history, a living organism for evoking and transmitting virtues without which no community can endure. A nation which forgets its past has no future.' The constitutional framework adopted by both countries recognizes this basic truth and so in both countries an attempt is made to build up a rational synthesis between the past, the present and the future, and this inevitably has to be achieved by the rule of law.

Both countries believe in the philosophy of planning. Economic progress can no longer be left to the rule of the market. The existence of the profit motive in private sector and private undertakings cannot be despised and should not be attempted to be annihilated; but it cannot be unduly encouraged either, and so democracy has to find a *via media* allowing both the private and the public sectors to function together not in competition or conflict with each other, but in co-operation with each other. Neither country subscribes to nationalization as a doctrine. They recognize that the public sector must justify itself by performance and must not claim acceptance solely on the basis of doctrinaire considerations.

Both countries recognize that the experiment on which their democracies are engaged in attaining socio-economic justice involves continuous dialogue, continuous examination of their policies and a willingness always to change them if experience shows that the policies adopted are wrong and need to be corrected. Revisionism is not, according to the democratic way of life, a source of weakness; indeed, it is its strength. There is no dogma to which either of the two countries subscribes. There is no 'ism'

which dominates the thinking of either country. There is a dedicated sense of purpose which inspires the activities—social, economic and political—in the life of both countries. Though the executive authority in Kenya is vested in the President, her Constitution preserves the principle of Cabinet Government with collective responsibility to Parliament. In this sense, though in form the Kenyan structure of political government differs, in substance the position is that in both countries the Parliament is supreme within the limits prescribed by the respective Constitutions. In India we have redrawn the map of the different constituent States on the basis of language and that has inevitably raised certain problems which provoke narrow regional loyalties. Indian democracy expects to stabilize these loyalties in due course and subordinate them to the major loyalty to the Union of India. Kenya has solved the problem of regional loyalties and the conflict of regional claims by changing the form of its government. It is now governed by a strong Centre and the regions are left to play a comparatively minor role.

May I however add in all humility that there is urgent need in Kenya to develop and strengthen a political philosophy and outlook and translate them into action which alone will effectively meet the challenge of tribalism and tribal and racial loyalties. Tribalism may not be very articulate today; but it is not unlikely that it may become articulate tomorrow; and Kenyan nationalism secular, progressive, forward looking must prepare itself to solve that problem by education, democratically and in accordance with the rule of law. If ever the Government of Kenya makes an attempt to distinguish between citizens and citizens on the ground of race, colour, religion or creed, it would be totally inconsistent with the letter and spirit of the Constitution of Kenya. Kenya, like India, is a multi-lingual, multireligious and multiracial country. I venture to express the hope that if the public life of Kenya is inspired by humanism, tolerance, reason and understanding the Africans, Asians and Europeans living here may set up an ideal pattern of a truly secular state.

There is another feature which is common to the national life of Kenya and India, and that relates to the important role which enlightened and articulate public opinion plays in the development of national life in both the countries. Both Kenya and India recognize that fundamental rights guaranteed to the citizens and obligations inherently involved in the said fundamental rights

can be translated into actualities of national life only if public opinion is sufficiently educated and becomes articulate. The great American Judge Learned Hand often emphasized that freedom thrives not merely because it is enshrined in a written constitution or because it is explained in learned judgments. It thrives only when it receives a continuous response in citizens' hearts. Like all democracies, Kenya and India realize that constant vigilance is the price of freedom and this vigilance can be exercised ultimately by enlightened public opinion alone. Law, no doubt, will play a significant role in the process of socio-economic transformation of the country; but the efforts which law would make must be supported by co-operation from the public.

Both Kenya and India are engaged in the fascinating and challenging task of converting their respective traditional communities into a new social order. Tradition is apt to make the community backward-looking and static, and may generate blind reverence for the past. The rational and scientific approach which both the countries have adopted seeks to make the communities forward-looking and dynamic. The creation of a new social order is a challenging problem and in the satisfactory solution of this problem the participation of the public, continuous, spontaneous and enlightened, is essential. That is another significant feature of national life which is common to both Kenya and India.

A comparative study of the Constitutions of the two countries and of their socio-economic developments in recent times, and the trend of nationalism, its aspirations, hopes and ambitions which inspire the people in both the countries, shows remarkable similarity in their philosophies and their basic postulates. That is why I think it is very appropriate that this distinguished University College should have, in co-operation with the Gandhi Memorial Academy Board, decided to institute the Gandhi Memorial Lectures. I have already referred to the dream which Gandhiji dreamt about the future of India. I think I would be justified in saying that the dream of Gandhiji is also the dream of your President Kenyatta. What is the ultimate goal of democracy in Kenya and in India? It is the same. In one sentence, the ultimate goal is to afford every citizen of Kenya and India full opportunity to enjoy the three precious gifts of democracy: life, liberty and happiness.

The great Indian poet Tagore gave expression, in his beautiful words, to this dream. As you know, Tagore, the great national

poet of India, was a patriot, a philosopher and an internationalist whose vision was not confined only to the four corners of India, but took within its majestic sweep the whole of the world. He dreamt that the destiny of the human race ultimately will take humanity to a stage where there will be one world, constituting one strong brotherhood of the human race. I often feel that both Kenya and India are marching onwards to the ideal indicated in that dream. The journey before both the countries is a long and arduous one; but the end is clear and it is only when that end is reached that the dream of Gandhiji and Tagore and the dream of Kenyatta will have been realized. Let me read to you the inspiring words of Tagore in *Geetanjali* in which this dream has found eloquent expression:

Where the mind is without fear and the head is held high:  
 Where knowledge is free  
 Where the world has not been broken  
 Up into fragments by narrow domestic walls:  
 Where words come out from the depth of truth:  
 Where tireless striving stretches its arms towards perfection:  
 Where the clear stream of reason has not lost its way into the  
 dreary desert sand of habit:  
 Where the mind is led forward by thee into ever widening  
 thought and action:  
 Into that heaven of freedom, my father,  
 Let my country awake.<sup>1</sup>

<sup>1</sup> Rabindranath Tagore, *Geetanjali*, XXXV (Macmillan & Co. Ltd., Calcutta, 1919), p. 27.

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